Office Supreme Court, U. S.
FILED
JAN 19 1927
WM. R. STANSBURY
CLERK

No. 301

In the Supreme Court of the United States

October Term, 1926.

Edward C. TWIST, *Petitioner*,

VERSUS

THE PRAIRIE OIL & GAS COMPANY, *Respondent*.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

THOMAS J. FLANNELLY,
A. A. DAVIDSON,
Attorneys for Respondent.

WEST, GIBSON, SHERMAN,
DAVIDSON & HULL,
Of Counsel.

INDEX.

PAGE

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld. 1

Propositions of Petitioners. 6

Propositions of Respondent. 7

I. The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved. 8

II. *(a) Carlile* v. *National Oil & Development Company* and *Winona Oil Co.* v. *Barnes*, decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules. *(b)* The order and judgment of the probate court approving the transactions involved, made in the exercise of a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved. 15

III. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of pro-

PAGE

cedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived. 22

IV. *(a)* The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contract. *(b)* The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding. . . . 57

V. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud. 83

AUTHORITIES CITED.

PAGES

Adams Express Co. v. *Trego*, 35 Md. 47 34
Anderson v. *Santa Anna T. P.*, 161 U. S. 361 16
Anderson v. *Santa Anna*, 116 U. S. 356 ..... 16, 20
Ardizzone v. *Archer*, 160 Pac. 446 14

B. & O. R. R. v. *Baugh*, 149 U. S. 368 16
Baker v. *Cureton*, 150 Pac. 1090 ..... 22, 47, 48
Beers v. *Haughton*, 9 Peters 329 57
Bogden v. *Reed*, 55 Ill. 458 81
Brewster v. *Langon Zinc Co.*, 140 Fed. 801 79
Brooks v. *Tucker*, 201 Pac. 645 82
Burgess v. *Seligman*, 107 U. S. 20 ..... 15, 19

Cabin Valley Mining Co. v. *Hall*, 155 Pac. 570 ..... 32, 47, 51
Carlile v. *National Oil & Dev. Co.*, 201 Pac. 377 11
Compiled Laws of Oklahoma, 1921, Sections 1458 and 1482 ..... 27, 28
Compiled Laws of Oklahoma, 1921, Section 6583 29
Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 112 Fed. 4 2
Cowen v. *Hubbard*, 151 Pac. 678 ..... 47, 48
Coules v. *Lee*, 128 Pac. 688 47

DeLorme, Admr., v. *Pease*, 19 Ga. 220 33
Doughty v. *Doughty*, 27 N. J. Eq. 315 81
Douglass v. *County of Pike*, 101 U. S. 677 16
Duff v. *Keaton*, 124 Pac. 291 ..... 24, 31, 32

East Alabama Railway Co. v. *Doe*, 114 U. S. 340 15
Eaves v. *Mullen*, 107 Pac. 433 ..... 22, 47
Ely Walker Dry Goods Co. v. *Smith*, 160 Pac. 698 81
Equitable Life Assurance Soc. v. *Brown*, 213 U. S. 25 6
Ewert v. *Robinson*, 289 Fed. 740 5

Federal Cement Tire Co. v. *Korff*, 50 Ind. Appeals 608, 97 N. E. 185 35
Fisher v. *National Bank of Commerce*, 73 Ill. 34 46
Folsom v. *Ninety six*, 159 U. S. 611 ..... 16, 20, 21

AUTHORITIES—Continued.

	PAGES
Gates, et al., v. Mack, 6 Col. 401	34
Gelpcke v. City of Dubuque, 1 Wall. 175	16
Gibson v. Lyon, 115 U. S. 439	15
Goodwin v. Bickford, 93 Pac. 548	40
Gormerly v. McGlynn, 84 N. Y. 284	34
Hamilton, et ux., v. Fowler, et al., 83 Fed. 321	39
Hardeman v. Donaghey, [illegible] Sou. 172	81
Harrell v. Prairie Oil & Gas Co., 8 Fed. (2d) 236	12, 82
Haskett v. Maxey, 33 N. E. 358	16, 53
Hathaway v. Hoffman, 153 Pac. 184	22, 47, 48
Havemeyer v. Iowa Co., 3 Wall. 294	16
Holmes v. Holmes, 111 Pac. 220	22
Hurt v. Hollingsworth, 100 U. S. 100	2
Holton v. Davis, 108 Fed. 138	81
Insurance Co. v. Debolt, 16 Howard 415	16
Kuhn v. Fairmont Coal Co., 215 U. S. 349	15, 17, 19
Lankford v. Platte Iron Works, 235 U. S. 477	15, 18
Liberty Oil Co. v. Condon National Bank, 260 U. S. 235	5
Main v. Lynch, 54 Md. 658, 668	37
Maxwell Land Grant Case, 121 U. S. 381	78, 79
Meehan v. Williams, 48 Pa. St. 238	85
Meyer v. Tupper, 66 U. S. 582, 17 L. ed. 180	36
Moffet v. Jones, 169 Pac. 652	22
Oklahoma Constitution, Article 7, Secs. 11, 12 and 13	22
Oklahoma Revised Laws, 1910, Sections 3330, 6547 and 6569	23
Olcott v. Supervisors, 16 Wall. 678	16
Ozark Oil Co. v. Berryhill, 143 Pac. 173	14
Papoose Oil Co. v. Swindler, 221 Pac. 567	14
Parmenter v. Ray, 158 Pac. 1183	47, 48
Patterson v. Winn, et al., 5 Pet. 233, 8 L. ed. 108	39
Probate Rules, 171 Pac. IX	14
Ray v. McKnight, 183 Pac. 489	81
Revised Laws of Oklahoma, 1921, Section 880	56
Revised Laws of Oklahoma, 1910, Section 5347	25

AUTHORITIES—Continued.

PAGES

Saylor v. *Taylor*, 77 Fed. 476 38
Scott v. *Gypsy Oil Co.*, 239 Pac. 887 81
Scott v. *McGirth*, 139 Pac. 549 22
Session Laws of Oklahoma, 1919, page 288 54
Sockey v. *Winstock*, 144 Pac. 372 47
Spade v. *Morton*, 38 Okl. 384 ..... 47, 48
St. Louis & San Francisco Ry. Co. v. *McAllister*, 165 Pac. 1123 40
Stanly County v. *Coler*, 190 U. S. 437 ..... 15, 20
State v. *Gideon*, 119 Mo. 94 44
State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525 45
Suckley's Administrator v. *Ratchford*, 13 Grattan 60, 65 Am. Dec. 240 46

Taylor v. *City of Ypsilanti*, 105 U. S. 72 16
The Atlantic Delaine Co. v. *James*, 94 U. S. 207 78
The People v. *Nichols*, 79 N. Y. 583 ..... 35, 36
Town of Hardingsburg v. *Cravens*, 47 N. E. 153 16
Townsend v. *Little*, 109 U. S. 54 ..... 85, 86
Tucker v. *Leonard*, 183 Pac. 907 22
Twaddle v. *Winters*, 89 Pac. 289 35

United States v. *Little Root Development Co.*, 200 U. S. 451 3
United States v. *Rentling*, 20 How. 252 44
United States v. *Wilson*, 118 U. S. 86 2

Van Ingen v. *Berger*, 82 Ohio St. 255 42

Waldo v. *Wilson*, 231 Fed. 654 4
Ward v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319 37
Watchorn v. *Roxana Petroleum Co.*, 5 Fed. (2d) 636 79
Weaver v. *Van DeVenter*, 19 S. W. 689 80
Welch v. *Focht*, 171 Pac. 730 ..... 22, 48
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Co.*, 137 Fed. 26 16
Wilson v. *Ware*, 6 Wall. 83 85

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1926.

No. 301

Edward [redacted] C. TWIST, *Petitioner,*

vs.

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* RESPONDENT.

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld.

The view taken by the Circuit Court of Appeals, briefly stated, is that the petitioners' cause of action is predicated upon the proposition that the leases under which respondent took possession of the lands were ended, and that it was a trespasser, the contract and stipulation extending the term of the leases being void and ineffective for that purpose; that the remedy at law which they had invoked

was adequate; that a federal court could not grant the relief of quieting title as prayed for because petitioners were not in possession and the respondent was in possession of the land; that the decree of the court was in effect a judgment at law, upon the issues involved, in favor of respondent, and that though brought to the appellate court by appeal, that court would treat it as if upon writ of error and would decide accordingly, but only upon the issues arising under the process, pleading and judgment, the trial being to the court without a jury, but without an express waiver thereof.

The authorities cited by the court seem ample to sustain its conclusions, and are not answered, we submit, by statements that the relief prayed for is equitable in its nature, and that a court of equity may dispose of the whole case and grant complete relief even if such relief be of the kind conferred by a court of law.

The petitioners' first cause of action was predicated on their ownership of land. They allege the execution of an oil and gas lease, which had expired at the time of the institution of the suit, and that the respondent was taking oil and gas from the land, and which is equivalent to an allegation that it was in possession.

—*Cosmos Exploration Co.* v. *Grey Eagle Oil Co.*, 112 Fed. 4.

Petitioners were claiming the legal title on the ground that the attempted extension of the term of such leases was void. In such a case the remedy is at law.

—*Hart* v. *Hollingsworth*, 100 U. S. 100;
United States v. *Wilson*, 118 U. S. 86.

The so-called second cause of action merely reiterates the allegations of the first, no new facts being set up, but upon the same facts petitioners pray that their title be quieted.

The action of the petitioners, as disclosed by the pleadings, is really one of trespass for the wrongful removal and conversion of oil and gas from the land, as the recovery of a money judgment by way of damages is sought, and there being no question of respondent's financial responsibility, the remedy at law is adequate, and equity will not entertain the case notwithstanding averments of fraud in the petition.

—*United States* v. *Bitter Root Development Co.*, 200 U. S. 451.

It is pointed out that the relief of cancellation of the contract extending the term of the leases was asked, and that the granting of this relief is not dependent on possession. It is apparent, however, this is merely a method of quieting title, for the suit is not predicated on rescission of the contract with the right to have same made effective, as a matter of record, by decree. Had the suit been of that character, petitioners would have been required to restore, or offer to restore, the consideration admittedly received under the contract. This, we understand, is the universal rule in equity, and is the requirement of the Oklahoma statute. (Sec. 5079, Laws 1921.) No such offer was made in the pleadings or proof, and attention is called to this omission for the purpose of emphasizing the view of the Circuit Court of Appeals that the suit was one to quiet title and not one predicated on rescission and cancellation. Furthermore, the petitioners asked for damages against a defendant presumably solvent, and were not entitled to the rem-

edy of cancellation without showing how they would sustain future injury by not having the contract of extension cancelled, or how the same, unless cancelled, would be a menace to the petitioners, or that there was danger that it would be used, tortiously or oppressively by the respondent to their injury; in other words, without showing how the remedy at law, which they had invoked, was not adequate. The judgment for damages would have been adequate, and moreover would have been conclusive of the rights of the parties, and could be pleaded as an adjudication against any claim of the respondent under the extended leases.

It is pointed out that respondent invoked equitable relief and is thereby concluded on the question under discussion. The answer of respondent called attention to the judicial proceedings resulting in the contract of extension of the term of the leases and its approval by the court as shown by the petition and its exhibits, and denied that the same were ineffective to extend the terms of the leases as charged in the petition. It admitted respondent's possession of the land, and that it was taking oil and gas therefrom, denied the charge of fraud, and set up that it was a bona fide purchaser of the extended leases, and asked that its title thereto be quieted. Are sections 274 A and 274 B of the Judicial Code applicable to that situation as claimed? Section 274 A relates only to the power of a court to order an amendment of the pleadings if the parties see fit so to do, in order that the same might be proceeded with on the proper side of the docket. *Waldo* v. *Wilson*, 231 Fed. 654. The fact that the cause here was proceeded with on the equity side and that the judgment was in the form of a decree is not conclusive, for the court found all the issues for the respondent, and its real judgment was that respondent was

the owner of oil and gas leases upon the lands involved (see decree). (*Ewert* v. *Robinson*, 289 Fed. 740.) Such a judgment would be equivalent to quieting respondent's title, and the mere fact that such relief was granted on its request did not operate to convert the action into a suit in equity.

Section 274 B merely permits equitable defenses in an action at law. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, is cited in support of the claim that the respondent's answer made the case an equitable one. There, however, the cause of action was at law for money had and received. Defendant admitted its liability for the money, but averred that it held the same as a stake-holder, and that others, besides the plaintiff, were claiming it, and therefore offered to pay it into court and prayed that the other claimants be made parties so that the question of ownership might be litigated as between them. The answer of the defendant set up an entirely different set of facts, which changed the issues so that the proceeding thereby became an equitable one, an interpleader under section 274 B. Surely that could not have been the result of respondent's answer in the instant case unless it had admitted the allegations of the petition and that the sole issue in the trial had been upon its plea of bona fide purchase. We take it that the equitable defenses referred to in section 274 B relate to equitable *remedies*, such as reformation, cancellation, etc., which were always available to a defendant against whom there exists an admitted legal liability. The word defense is the significant word signifying something which simply defeats recovery in an action or suit and not something by means of which the defendant can have independent relief. Pomeroy's Code Remedies, paragraph 27.

The conclusion of the Circuit Court of Appeals that the primary relief was at law and furnished an adequate remedy—the equitable relief demanded being incidental only, *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25—and that it was immaterial that the real judgment was, by common consent, in the form of a decree, appears to be sound in principle. It is not a question of waiver or failure to object to the procedure; it is a question of whether the petitioners have the right to insist that the primary and principal relief demanded by them was equitable and that they were entitled to such relief upon the face of their petition. The construction of that petition by the Circuit Court of Appeals puts the petitioners in the attitude of asking the trial court to adjudge and determine whether the respondent was a trespasser and was wrongfully removing oil from their lands, and if so, to award them damages for such wrongful conversion, and, as an incident to such recovery, declare by a decree the invalidity of the lease extensions. The petitioners are insisting, however, that the allegations of fraud and non compliance with Rule 9 made the main cause one for equitable relief, with damages as an incident. The authorities would appear to sustain the view of the Circuit Court.

On the merits the two propositions advanced by petitioners are:

First. That the extension of the term of the leases on June 16, 1916, was not made in accordance with the provisions of Rule 9 of the probate rules promulgated by the justices of the Supreme Court of Oklahoma, and that therefore the probate court in approving such extensions acted without jurisdiction.

Second. That the extension was obtained by fraud

and unfair dealings and for a grossly inadequate consideration.

Under the first proposition there is presented a question of public interest, *viz:* whether the highest court of a state, or the judges composing that court, may, under statutory authority to make general rules to carry out the provisions of the state code, prescribe a rule regulating the procedure of inferior courts of general jurisdiction so as to nullify their judgments in respect to matters within such jurisdiction because of non-compliance with a rule so prescribed, and whether this court is bound by the decision of the state Supreme Court that the judgment of such inferior court rendered without an observance of the rule is void for want of jurisdiction and retroactive in its effect.

On the merits of the case as a whole it is the position of the respondent:

1. The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved.

2. (a) *Carlile* v. *National Oil & Development Company* and *Winona Oil Company* v. *Barnes*, decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules.

(b) The order and judgment of the probate court approving the transactions involved, made in the exercise of

a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved.

3. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of procedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived.

4. (a) The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contracts.

(b) The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding.

5. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud.

I

Before discussing the questions of law involved in the petitioner's first proposition we desire to call the court's attention to the proceedings in the probate court resulting in the order and judgment herein assailed, and from which, we think, the conclusion may fairly be drawn that the re-

quirements of the rule referred to were observed so far as they could apply to a transaction not within the express terms of the rule itself. That rule provides that no oil and gas lease covering the lands of infants under guardianship will be approved "except after sale in open court to the highest and best responsible bidder," and that "notice of such sale must be given by posting and by publication, where publication is practicable."

The record shows that notice was given; that Mrs. Weldy, as guardian of her minor children, and as administratrix of the estate of William G. Twist, deceased, gave notice that she would "sell at public sale to the highest bidder, subject to confirmation of said court, on Friday, the 16th day of June, 1916, at 10:30 o'clock A. M., in the County Court room in the City of Tulsa, Oklahoma, an extension of oil and gas mining lease now covering the following described tracts of land in Tulsa County, State of Oklahoma, to wit:" (Describing the tracts of land covered by the four leases.) (R. 26.) This notice was posted on June 5, 1916, in three public places in Tulsa County (R. 28), which was in compliance with the order of the County Court (R. 12). On June 16, 1916, the guardian and administratrix made a sworn report that she had executed to the Los Angeles-Cherokee Oil Company an extension of the terms of the four leases "for a period from the date of the expiration of each of said present leases for so long as oil and gas should be produced" and for a total cash bonus of $18,000.00, and increase in the amount of royalty from ten per cent to twelve and one half per cent of the oil produced and saved from the premises (R. 13-14). On the same day the court made an order reciting that it had heard the petition, witnesses, and statement of counsel, and reciting the

consideration for the extension to be "the sum of $18,000.00 in cash, and an increase of the royalty on each lease from ten (10%) per cent to twelve and one-half (12½%) per cent, effective forthwith, and the drilling of a well on each of said tracts within six months from this date," and finding "that said proposition is beneficial and for the best interests of said minors and that the same should be approved." The approval is in the following language:

> "It is further considered, ordered and adjudged that the court having examined said agreements extending the terms of said leases, does hereby approve and confirm the same, and does approve and confirm the extension of said leases for a term so long as oil or gas shall be found thereon." (R. 15-16.)

There is nothing to indicate, and Mrs. Weldy offered no evidence, that anyone had made a better offer than the Los Angeles Cherokee Oil Company had made her. It was therefore the highest and best bidder in the absence of any proof that other persons offered or made a better or higher bid.

Counsel for petitioners have not pointed out wherein the proceedings failed to comply with the requirements of Rule 9, except to urge certain "irregularities," which, in effect, are that the proceedings related merely to the approval of an agreement which the guardian had made with the Los Angeles Cherokee Oil Company—the lessee under the existing leases—and not to a sale of an extension of the terms of such leases. If Rule 9 applied to the situation at all, the court must be impressed with the difficulty of applying it to the case of a proposed extension of the term of an existing lease. This difficulty was recognized by the Supreme Court of Oklahoma in the two cases cited by petitioners in

support of their contention that the extension of the terms of these leases was void (*Winona Oil Co.* v. *Barnes; Carlile* v. *National Oil & Development Co.*). In the *Carlile* case it was said:

> "The defendant in error suggests in their brief that it would be a vain and useless thing for the court to put up at public auction, during the term of a lease, the question of the extension and modification of the old lease, for the reason that no one would bid on such an interest but the old lessee, due to the interest of the old lessee still subsisting."

And in reply to that contention the court said:

> "The trouble with such a contention is that it involves a suggestion of a reason why a court, in the exercise of its discretion, and with due regard to the interests of the ward, should not make an order allowing a sale or an extension under such conditions, but if, in any case, the County Court, in his discretion, concluded it was the best interests of the minor that it be done, there is no reason why there could not be at least *a reasonable compliance with the procedure laid down in Rule No. 9. It might result in a vain thing and result in the same thing as has resulted in the instant case. But it would result in a sale, judicial in its nature, and the rights of the minor would at least be protected by an opportunity for open and public bidding, and the purposes of the law satisfied.*"

The extension of the lease in that case was made without notice of any kind, and it was admitted that the result might have been no different even if public notice *had* been given, but that in such event the rule would have been obeyed and the court would then have been powerless to strike down the result of obedience to its own mandate or

the mandate of the judges composing the court, who, as such, promulgated the rule.

In *Harrell* v. *Prairie Oil & Gas Co.*, 8 Fed. (2d) 236, the question of the extension of an existing lease at a time when Rule 9 was in force, was involved. The requirements of the rule as to publication, etc., were complied with, and the lessee was the purchaser at the sale. It was contended that the probate proceedings were ineffective to extend the lease because, among other things, they

> "failed to state, either in the petition of the guardian to sell the new lease, or in the order authorizing its sale, or in the notice of sale, whether the proposed lease would take effect immediately upon its approval by the court or at the end of the term of the then existing lease; that the purpose of the sale and lease would be a cloud upon the title of any bidder other than appellee, and the lease to anyone else would not become effective until the expiration of the old lease, thus preventing competitive bidding; that the proceedings were fraudulent in that the notice of the proposed giving of the new lease did not state that the lands then had producing wells thereon."

The argument, however, did not prevail. The court said:

> "There is no statute of the state regulating the procedure in the sale of an oil lease on a ward's lands, but in 1914 the Supreme Court adopted a rule governing the procedure which has been adjudged controlling (*Carlile* v. *National Oil & Development Company*, 83 Okl. 217, 201 Pac. 377), wherein it is provided that such leases must be sold in open court to the highest and best responsible bidder, that petitions for the approval of such leases shall be filed at least five days before the same are to be sold, and that notice of such sale must be given by posting and publication where publi-

cation is practicable. All of these requirements were complied with."

The proceeding in the instant case was an honest and painstaking effort on the part of the probate court to comply with the rule and also to accommodate the notice to the actual facts and circumstances. To have given notice of a sale of a lease would have been misleading. Prospective bidders would not know from such notice that the leases advertised were existing leases, completely equipped and producing oil. Furthermore, a bidder would have to contemplate the dismantling of the leases of their equipment by the Los Angeles Cherokee Oil Company at the end of the prescribed term, for, of course, it was not obligated to sell that equipment. Prospective bidders were therefore informed by the notice that it was the extension of existing leases which was to be sold. The court wanted to be advised, of course, as to the expediency of extending the term or permitting the leases to expire with all the consequences which might result from dismantling them of their operating equipment at that time, and consequently gave notice that it would hear any objection as to why the leases should not be extended. To urge that a private arrangement or contract between the lessee and the guardian and administratrix had already been made, is beside the point. That agreement had no validity unless the court approved it. If anyone had appeared pursuant to the notice and had offered a better arrangement than the proposition of an extension of the existing leases, or had made a better offer for such extension, all of which was the object of giving the notice, and of which there would have been no necessity except for the rule, the court, we must assume, and in accordance with its duty to protect the interests of the

ward, would have adopted it. It has never been the opinion of the writer that the rule applied to the extension of the term of an existing lease, a matter involving merely the modification of the original lease, which is not a sale, but a contract for the use, of property. (*Papoose Oil Co.* v. *Swindler*, 221 Pac. 507.) In the very nature of things the proceedings to obtain the extension could only be a compromise between the actuality and the rule required to be observed. The question of modifying the original contracts was addressed to the discretion of the probate court which has jurisdiction over a minor ward and his estate until he arrives at majority.

—*Ozark Oil Co.* v. *Berryhill*, 143 Pac. 173.

That view has support in *Ardizzone* v. *Archer*, 160 Pac. 446, which, by clear inference, holds that the modification of an oil and gas lease, with the consent of the probate court, is binding. There was in the instant case a formal compliance with the rule as to notice. The fact that there was no "publication" of the notice in addition to its being posted in three public places, is immaterial. Rule 18 of the same rules provides:

> "All advertisements not required by law may be waived with the consent of the County Court upon the approval of the probate attorney or tribal attorney."
>
> —171 Pac., page IX.

The objection that there was no "sale" of the extensions because the probate court did not in terms authorize or direct the sale, is not well taken. The notice given under the rule was specific, namely, that the guardian would "sell at public sale to the highest bidder * * * an extension of an oil and gas mining lease," and the subsequent approval

by the court of the execution of the extended leases to the lessee for the consideration offered by it can amount to nothing else but a sale within the meaning of the rule. We think there can be no doubt, therefore, that the provisions of Rule 9 were complied with, and if so, further discussion of the petitioner's first proposition would seem to be unnecessary.

II.

But even if it were true that the rule had not been complied with and the proceedings did not amount to a sale subject to competitive bidding as held in the *Winona* and *Carlile* cases, it is our contention *(a)* that as there was no decision on this point at the time the rights claimed herein arose, the subsequent decisions of the State Supreme Court were not controlling, and that this court has the right to exercise its independent judgment on the question; and *(b)* that the order and judgment of the County Court made in the exercise of a jurisdiction recognized by the State Supreme Court in its prior decisions was valid, and that under the rule of such decisions a right of property vested in the Prairie Oil & Gas Company by its contract of purchase of such extended leases. In support of these contentions we rely upon:

Kahn v. *Fairmont Coal Company*, 215 U. S. 349;
Burgess v. *Schuyman*, 107 U. S. 20;
Lankford v. *Platte Iron Works*, 235 U. S. 477;
Stanly County v. *Coler*, 190 U. S. 437;
East Alabama Railway Company v. *Doe*, 114 U. S. 340;
Gibson v. *Lyon*, 115 U. S. 439;

Anderson v. *Santa Anna*, 116 U. S. 356;
B. & O. R. R. v. *Baugh*, 149 U. S. 368;
Folsom v. *Ninety six*, 159 U. S. 611;
Douglass v. *County of Pike*, 101 U. S. 677;
Anderson v. *Santa Anna T. P.*, 161 U. S. 361;
Insurance Co. v. *Dobolt*, 16 Howard 415;
Gelpcke v. *City of Dubuque*, 1 Wall. 175;
Havemeyer v. *Iowa Co.*, 3 Wall. 294;
Olcott v. *Supervisors*, 16 Wall. 678;
Taylor v. *City of Ypsilanti*, 105 U. S. 72;
Haskett v. *Maxey*, 33 N. E. 358;
Town of Hardingsburg v. *Cravens*, 47 N. E. 153;
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Company*, 137 Fed. 26.

In the case first cited, the plaintiff, Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia. The deed contained a clause granting unto Camden all the coal and mining privileges necessary and convenient to the removal of the coal, together with the right to enter upon and under said land, and to mine, excavate and remove the coal, etc. Suit was commenced by Kuhn to recover from the coal company damages arising from the failure of the coal company to maintain proper supports so that the overlying surface was caused to fall. It appears that after this deed was executed to Camden, one Griffin brought an action in a court of West Virginia similar in all respects to this one against the Fairmont Coal Company, which was the successor of Camden. Griffin's rights arose from a deed almost identical with that executed by Kuhn to Camden. The *Griffin* case was decided in favor of the coal company and

the case was appealed to the Supreme Court and an opinion rendered (see 59 W. Va. 480) sustaining the lower court. In the *Kahn* case it was urged that the decision upon this question by the Supreme Court of West Virginia was binding upon the federal court sitting in West Virginia. The case reached the Circuit Court of Appeals which certified this question as to the binding effect of the *Griffin* case to the Supreme Court of the United States where the answer was that the decision was not binding upon the Federal Court, and in passing upon the question the court, in an opinion by Justice HARLAN (HOLMES, WHITE and MCKENNA dissenting), announced a rule covering the whole subject of the effect of decisions of the state court in the Federal Court, and we quote from the opinion the following:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules: *1.* When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal Court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. *2.* Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal Court as authoritative declarations of the law of the state. *3. But, where the law of the state has not been thus settled*, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence. *4.* So, when contracts and transactions are entered into and rights have accrued under a particular state of

> the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal Court should always lean to an agreement with the state court if the question is balanced with doubt."

In *Lankford* v. *Platte Iron Works*, 235 U. S. 461, which was originally commenced in the Federal Court for the Western District of Oklahoma, the question involved was whether a suit against the State Banking Board of the State of Oklahoma was a suit against the state. The principal opinion held that it was, and in reaching the conclusion, prefaced a reference to several decisions of the Supreme Court of Oklahoma with the following statement:

> "Certainly this construction can be given to the Oklahoma statute; and granting that it may admit of dispute an important element to be considered is the decision of the state tribunals,"

but nowhere in the principal opinion is there any statement to the effect that the decisions of the state tribunal are binding upon the Federal Court.

A dissenting opinion by Mr. Justice Pitney, concurred in by Justices Day, Van Devanter and Lamar, held that it was not a suit against the state, and we quote the following from the dissenting opinion:

> "We are referred to certain cases in the state court of last resort, one of which, and a very recent

one, bears directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties —a ground of jurisdiction especially provided for in the Constitution (Article III, section 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose*. For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess* v. *Seligman*, 107 U. S. 33, 34; *East Alabama Ry.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 357, 360."

The foregoing dissenting opinion applies the rule announced in the case of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, to the construction of a statute and the following cases referred to in the dissenting opinion of Mr. Justice Peckham also involve the construction of statutes and apply the same rule as that announced in *Kuhn* v. *Fairmont Coal Company, supra*.

Burgess v. *Seligman*, 107 U. S. 20, involved the construction of a statute of the State of Missouri.

Stanly County v. *Coler*, 190 U. S. 437-443, involved the construction of the Statutes and Constitution of North Carolina.

The first syllabus in *Anderson* v. *Santa Anna*, 116 U. S. 356, reads as follows:

> "When at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a state the highest court of the state has construed the law under which it purports to be issued rights accruing under that construction will not be affected merely by the subsequent decisions of the same courts varying or departing from it."

At page 362 of this opinion the court discusses the rule where there was no decision construing the statute at the time the rights accrued and uses the following language:

> "If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Schopfeld* v. *Watkins* and *Keithsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the state court in reference to the power of the legislature to enact the Statute of February 28, 1887. In that case the duty of this court is to determine what was the law of Illinois when the rights of the parties accrued."

In *Folsom* v. *Ninety-six*, Folsom brought suit against township ninety-six in the County of Abbeville to recover on bonds of the township issued on March 25, 1886, to aid in building a railroad. In 1888 the Supreme Court of South Carolina held in *Floyd* v. *Perrin*, 30 S. C. 1, and *Whitesides* v. *Neely*, 30 S. C. 31, that the act under which these bonds were issued was unconstitutional and void. It was urged that this decision was binding upon the federal court in the

determination of the case of *Folsom* v. *Ninety-six* but the Supreme Court of the United States held to the contrary and after quoting at considerable length from the case of *Burgess* v. *Seligman*, 107 U. S. 20, uses the following language at page 626:

> "In the case at bar, the Statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligation of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the profession, and by the legislative, executive and judicial departments of the state. And the decisions of the Supreme Court of the state, during the same period, appear to have assumed the validity of such bonds. *Chamblee* v. *Tribble*, and *Carolina Railway* v. *Tribble*, above cited."

And again at page 27:

> "There not being shown to have been a single decision of the state court against the constitutionality of the Act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its views of the law of South Carolina."

We therefore maintain that this court has the right to determine for itself the effect of a violation of Rule 9.

III.

It has long since been settled that under the Constitution and Statutes of the state, County Courts are courts of general jurisdiction with respect to infants and their property.

—*Eaves* v. *Mullen*, 107 Pac. 433;
Scott v. *McGirth*, 139 Pac. 519;
Welch v. *Focht*, 171 Pac. 730;
Holmes v. *Holmes*, 111 Pac. 220;
Baker v. *Cureton*, 150 Pac. 1080;
Hathaway v. *Hoffman*, 153 Pac. 184;
Moffet v. *Jones*, 169 Pac. 652;
Tucker v. *Leonard*, 183 Pac. 907.

Section 11, article 7 of the Constitution provides:

"There is hereby established in each county in the state a County Court which shall be a court of record."

Section 12, article 7, provides:

"The County Court, coextensive with the county, shall have original jurisdiction in all probate matters."

Section 13, article 7, provides:

"The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

The relevant statutory provisions on this subject are found in sections 3330, 6547 and 6569, Revised Laws of 1910. Section 3330 is a part of the chapter on guardian and ward, and provides:

> "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

The other two sections are a portion of the chapter on probate procedure. Section 6547 provides:

> "Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas in consideration of a royalty of part or portion of the production thereof and under the same procedure in the County Court as now provided by law where such consideration is money."

Section 6569 provides:

> "The County Court on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders, and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The power and authority conferred on guardians and County Courts by the constitutional and statutory provisions of the probate system in Oklahoma, is as great and comprehensive as that found under the constitution or laws

of any state with which we are acquainted. Here, in express language, is conferred on the guardian and the County Court the power to make oil and gas mining leases *without limitation or the hint of limitation as to the term of the leases*, without limitation or restriction or the hint of limitation or restriction on the power conferred, without regulation of the manner of the exercise of the power conferred save the leasing is to be "*under the same procedure as now provided by law.*" Under this system of laws the County Court is the successor to or inheritor of all probate authority exercised at common law by any court except where such power is limited by constitutional and statutory provisions. Where the legislature intended such power to be limited they have limited it, as for instance, by providing that the County Courts may not order or control the marriage of its wards. This jurisdiction *is in its nature exclusive because it is general in character* and the constitutional provisions do not confer on any other court *any jurisdiction* concerning probate matters except on appeal. It, therefore, of necessity, follows that the County Court is the only court in Oklahoma possessing *original probate jurisdiction*, and that as a consequence of the foregoing constitutional and statutory provisions it possesses all *the power heretofore possessed by chancery courts in the control, management and disposition of the property of its wards and possesses such jurisdiction to a greater extent than possessed by chancery courts.*

In *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, the Supreme Court of Oklahoma, after reviewing the constitutional provisions, says:

"By sections 1, 2 and 3 of article 7 of the constitu-

tion, jurisdiction of all probate matters is conferred upon the County Court."

It was further held in that case that the sections of the statutes above quoted control the proceedings of County Courts in the sale of an oil and gas mining lease. The legislature has never changed or amended these statutes. It is insisted however that Rule 9 abrogates these provisions, and that the effect of the rule is to render void, for want of jurisdiction, any order or judgment of a court which is the result of proceedings not conducted in strict compliance with the rule. We submit that the rules cannot have that effect, and that the conclusion of the Supreme Court in the cases mentioned is absolutely untenable, for the following reasons:

First. All the authorities hold that a rule of court *cannot take away from, add to, or change the statute*, and therefore Rule 9 could not take away the constitutional and statutory power of the County Court to make the orders assailed in these cases.

Second. Section 5347, Revised Laws of Oklahoma, gives the Supreme Court the power to revise its general rules and make such amendments thereto as may be required to *carry into effect the provisions of the code*. One of the provisions of the code to which effect must be given, as construed in *Duff* v. *Keaton*, is that the probate court has the right to *order a private sale of a lease*. Any rule must therefore *give effect to such a provision*, but the decision of the court in the *Winona* and *Carlile* cases is that the rule *takes it away*. Section 5347 further provides that the court "shall make further rules consistent therewith as they may deem proper." A rule *taking away the very power given by the code, viz.*, the power to make a private sale,

is certainly *inconsistent* therewith and in violation of the statute.

Third. The defendant, The Prairie Oil & Gas Company, could not have anticipated such a construction of Rule 9 because statutes controlling probate procedure, just as mandatory in language and form as the provisions of that rule have been construed, in a long line of decisions by the state Supreme Court, before its rights accrued, as directory only and not affecting the jurisdiction of the County Court.

Conceding the entire correctness of the doctrine that rules of court lawfully promulgated and properly put into effect have the binding force and effect of law, yet if Rule 9 is to be considered in any other light than as being directory merely it must fail and be rejected as of no force and effect because:

(a) It deprives the County Court of the discretionary power conferred by section 6569 of the statutes; *(b)* because it interferes with the exclusive jurisdiction and control of the guardian in the management and disposition of the property of his ward conferred by section 3330 of the statutes; and *(c)* because it is an attempt to limit and control the jurisdiction conferred on County Courts in probate matters by the constitution, and expressly as to the jurisdiction conferred by sections 3330, 6569 and 6547 of the statutes.

It is at once evident that if without Rule 9 County Courts had jurisdiction to approve or direct the making of oil and gas mining leases by guardians on the lands of their wards, without advertisement and without public sale, and such rule is to be construed as to deprive such courts of

such power, *it is a limitation upon the jurisdiction of such courts*, and deprives such courts of the power to be governed and controlled alone by what, in their judgment, is the best interest of the estate of the minor.

This is so because the question is not presented on appeal or on direct attack, but insofar as the particular question under consideration is concerned, each of the cases under review constitutes a collateral attack on the judgments of the County Court, and the question now presented to the court is not whether the County Courts wisely exercised the discretion conferred by law on them; it is not a question of whether the record discloses that the action of the different County Courts was for the best interest of the minor, but the attack is frankly predicated on the assumption that the County Courts had no jurisdiction because of the alleged departure from Rule 9 and that therefore the orders made are void and subject to both direct and collateral attack.

If Rule 9 is to be given the force ascribed to it by the lessors, this court must of necessity hold such rule to be void and of no effect, whereas, if it is held to be directory or advisory, there is and can be no question of its validity, and when two constructions are capable of being placed on the rule, one of which gives it force and effect, and the other deprives it of force and effect, the construction which will give force and effect to the rule is that to be adopted and declared as the true construction.

In order to demonstrate the correctness of these statements it is only necessary to consider a few sections of the state statutes.

Section 1458 (Laws of 1921) provides:

"Guardians of infants and insane persons are

hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court as now provided by law, where such consideration is money."

It appears from the most casual examination of the terms of the above section that guardians are vested with power *(a)* to make a mineral oil and gas lease for a royalty instead of for cash; *(b)* to make a grant of mineral oil or gas in consideration of a royalty instead of for cash; *(c)* that such lease or grant must be approved by the County Court, and in such approval the same procedure must be followed as that provided by law where the consideration of such lease or grant is money; *(d)* that the act presupposes that the power exists in the guardian, with the approval of the County Court, to make oil and gas mining leases and grants for a cash consideration, and also presupposes that a procedure governing such a lease or grant for cash exists.

Assuming this analysis of the statute to be correct, and that it is so scarcely admits of a doubt, it is necessary to discover the statute under which the authority of the guardian to make oil and gas mining leases for cash, and providing the procedure therefor, is given. This statute is found in section 1482 of the Laws of 1921, which is as follows:

"The County Court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders and give such directions as are needful for the

management, investment and disposition of the estate and effects, as circumstances require."

To appreciate the full force and effect of this last section, it is necessary to consider the same together with section 6583 of the statutes, which is as follows:

> "In all cases the court making the appointment of a guardian *has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.*" (Italics ours.)

These two sections taken together, and in connection with the other statutory and constitutional provisions quoted in this brief, conclusively establish that the County Court is the only court that is given jurisdiction to control the guardian in the disposition and management of the estate of his ward, and that such jurisdiction is exclusive. This means it is free from the dictation, supervision or control of any other superior directing force, and that *to undertake to control, and direct the County Courts, and to say to them that they shall proceed only in a certain manner and by a particular designated method, and to say that unless such power is exercised in the manner and method so prescribed the County Court has not jurisdiction, is to, in reality, control the guardian in the management and disposition of the ward's estate, for when we control the power behind the throne we, in fact, control the throne.* When we say that the acts of the guardian shall be of no binding force and effect unless such acts conform to and receive the sanction of a rule prescribed by any other body than the County Court, we, in truth and in fact, as well as in effect, *control the guardian in the management and disposition of his ward's estate.* When, in addition to the pro-

visions of law, a court lays down a rule, *and says there exists no right of action except in conformity to and in compliance with such rule, it limits, it controls the jurisdiction existing before the annunciation of the rule.*

If the rule so announced deprives the court of *any discretion*, and compels action only in a *particular channel*, regardless of whether the court acting thinks such action is best for the interest of the minor or not, it deprives it of the *discretionary powers vested in it by the constitution and the statutes*, and deprives it of the power to control the guardian in the management and disposition of his ward's estate as to what the court considers to be the best interest of the ward, *and substitutes the discretion of the County Court by the discretion of another court.*

The reason that County Courts and the chancery courts in exercising probate jurisdiction have been invested with discretionary powers in the management and control of the estates of their wards is that human experience has demonstrated the folly of trying to provide for the unknown contingencies that arise in the management and control of such estates by inflexible rule. Such experience has demonstrated the need of *flexibility and the injurious effects of its want.*

It is apparent from the most casual inspection of the above sections of the statute that they prescribe the procedure to be followed in the leasing of minors' lands. The words "as now provided by law," in section 6547, mean something, and must mean that such section proclaims and ordains *the then existing procedure as the procedure necessary to be followed.* The procedure is that found in section 6569 of the statute, that is, that on application to the Coun-

ty Court to lease lands of his ward by a guardian, the County Court has power to make such orders and give such directions as are needful for the management and disposition of the estate and effects of its ward as circumstances may require, and to approve or disapprove the making of such leases as in its discretion the interests of the minor require, and there is nothing in either section of the statute that requires the *application to lease to precede the actual leasing*. There is nothing that indicates a legislative intention to secure the prior authorization of the court to the making of a lease before its execution by the guardian. The only thing necessary to obtain is the approval of the County Court to the lease or grant, and it matters not whether the approval is made prior or after the leasing. In fact, the more orderly method of procedure would be to secure the approval after the leasing. This being the procedure provided by law, no court can make a rule *changing or modifying such procedure unless by constitutional or statutory enactment it is expressly given the power to modify or change the rules established by legislative enactment*. This we believe to be too clear to need further argument or lucidation. In fact, it seems that the above propositions are so clear that argument but serves to conceal and not to explain, and therefore we will proceed to the citation of a few out of the multitude of cases sustaining the above propositions.

In *Duff* v. *Keaton, et al.*, 33 Okl. 93, 124 Pac. 291, the Supreme Court of Oklahoma, by Justice WILLIAMS, impliedly holds that section 1482 is the section under which the County Courts have power to approve oil and gas mining leases of guardians and furnishes the procedure named in section 6547. In such case the court says:

"But it is insisted that these conclusions are contrary to section 5530, Compiled Laws of 1910 (6547, Laws of 1910), which authorizes the guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by section 5513, *supra* (6569, Laws, 1910), and that by said section said leases in order to be valid must be *first approved by the probate court;* it being specifically provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. Having also reached the conclusion that such a lease was personalty and not realty, *it is under the procedure by virtue of said section 5513 that oil and gas leases were authorized to be approved by the probate courts, and section 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.*" (Italics ours.)

In *Cabin Valley Mining Company* v. *Hall*, 53 Okl. 760, 155 Pac. 570, this court explicitly holds that section 1482 furnishes the procedure referred to in section 6547, the court saying:

"The procedure referred to is that prescribed by section 6569, *supra*, which requires the guardian to make application to the County Court, after notice in accordance with the directions of the judge, where

upon the court is authorized to make such orders and give such directions as are needful and as the circumstances may require. *Duff, et al.*, v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (n. s.) 472. There is no limit in this section as to the terms of the lease, nor any limitation as to the time for which same may run; it being left to the judgment of the court *in the exercise of a sound discretion, TO DETERMINE what is best for the interest of the minor under the circumstances.*" (Italics ours.)

So there is no limitation put upon the authority of the County Court to approve leases except that found in section 1482 of the statutes, and it is left to the sound *discretion of the court*, that is *of the County Court*, to determine whether such lease shall be made, after advertising for bids therefor at public outcry, *or by disposing of the same to a particular named person for a fixed price*. Either of these methods might at different times and under varying circumstances be for the best interest of the minor, and the court without limitation, is given authority by the statute to adopt either of these courses, or any other course, which, in its judgment, will be for the best interest of the minor under the then existing circumstances.

If Rule 9 limits the discretion so reposed in the court, it must, under all the authorities, be held bad, and the only way to uphold and sustain it is to regard it as only directory and advisory, and consequently jurisdiction of the court does not depend upon compliance with its provisions. In *De Lorme, Administrator*, v. *Pease*, 194 Ga. 220, the court, by Justice LUMPKIN, says:

"It is not denied but that this rule of the Supreme Courts restricts the *discretion* of the courts as to the

permission to recall a witness, which was unlimited at common law. *Have the judges this power? Clearly not.* Their power extends to and was intended to embrace all ground *uncovered by the statute or common law.*" (Italics ours.)

In *Adams Express Company* v. *Trego*, 35 Md. 47, the court says:

"If the court below was not satisfied that the ends of justice required a continuance, it was clearly right in refusing to grant it; *and no mere rule of court could be allowed to operate to divest such discretion, or in any manner to change or modify the statutory provision on the subject. Rules of court must not be in conflict or inconsistent with the statute law of the state.*" (Italics ours.)

In *Gormerly* v. *McGlynn*, 84 N. Y. 284, it is said:

"The provision of the Code of Civil Procedure (Sec. 17) authorizing a convention of the general term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to *alter, modify or annul any rule of practice established by the code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code.*"

In *Gates, et al.*, v. *Mack*, 6 Col. 401, it is said:

"The next point made in behalf of the defendants in error is that the appeal was properly dismissed for the default of the plaintiffs in error to comply with a standing rule of the District Court. This rule is set out in the transcript, and provides, substantially, that in any case appealed from the County Court to said District Court, if the appellant shall fail for a period of fifteen days to file in the District Court a transcript

of the proceedings, together with all necessary papers relating thereto, the appellee, upon filing a transcript of the judgment and a copy of the appeal bond, shall be entitled to have the appeal dismissed at the cost of the appellant. Counsel argues that it cannot be fairly inferred that the legislature ever intended to require written notice of a motion to dismiss in a case of this sort, where there is a standing and general rule of court, of which counsel are bound to take notice, providing for a dismissal; that such a rule is a standing notice of such motion, and that this rule is analogous to Rule 26 of this court, under which appeals are dismissed in like manner. *To these propositions we answer that a rule of court cannot supersede a statute.*"

In *Federal Cement Tire Company* v. *Korff*, 50 Ind. Appeals 608, 97 N. E. 185, the court says:

"The rule of court cannot abrogate or prevent the exercise of a statutory right."

In *Twaddle* v. *Winters*, 89 Pac. 289, the Supreme Court of Nevada says:

"Where there is a conflict between a statute and a Supreme Court rule, the former will control."

In *The People* v. *Nichols*, 79 N. Y. 583, the Supreme Court of New York, speaking of a rule which attempted to prevent judges from exercising certain jurisdiction except at stated times, and to designate terms of court at which only certain kinds of business could be transacted, said:

"It is provided by the constitution that the court itself shall have general jurisdiction in law and equity. It follows that this jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself. (*Hart* v. *Hatch*, 3 Hun. 375.) Its

functions are to be exercised by its judges sitting in general terms, or at the circuit or oyer and terminer or special terms. The constitution also provides that each judge may hold special terms in any county (Art. 6, Sec. 7), and neither in that instrument nor in any statute do we find that one special term, or one judge at special term has, or can have, more authority or power than another. The Code (Sec. 233) authorizes the justices of the Supreme Court for each judicial district to appoint the times and places for holding the special terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as 'Special Terms for Equity Cases and Enumerated Motions,' and others as 'Special Terms for Non-enumerated Motions and Chamber Business,' and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the direction of the judges, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. *If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy and the rights of citizens infringed.* The case before us illustrates this position." (Italics ours.)

Again on page 592 the court says:

"It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore be of eight days. *But the rule is binding only as it is consistent with the Code.*" (Italics ours.)

In *Meyer v. Tupper*, 66 U. S. 582, 17 L. ed. 180, the court says:

"After the passage of the Judiciary Act of 1789, Congress, at the same session, passed the act prescrib-

ing the process to be used in the different courts it had just established (1 Stat. 93); and by the act directed that, in the courts of admiralty and maritime jurisdiction, *the forms and modes of proceeding should be according to the course of civil law.*

"This act left no discretionary power in the admiralty courts, or in the Supreme Court, *in relation to the modes and form of proceeding.*" (Italics ours.)

In *Ward* v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319, the court explaining the holding in *Beers* v. *Houghton*, 9 Pet. 360, says:

"Explained as above, the remarks are perhaps without objection, *but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish or vary the operation and effect* of mesne or final process upon the property of the debtor in respect to the matter under consideration." (Italics ours.)

In *Main* v. *Lynch*, 54 Md. 658, 668, the court says:

"This motion was opposed by the defendants because of the twenty eighth rule of that court which is as follows: 'When a plaintiff or defendant has closed his case on the testimony, and a prayer shall be offered to the court upon such testimony, he shall not offer any additional evidence on the subject to which the prayer refers or with regard to the case in any particular'; but the court permitted the amendment and received the proof offered. It is the ruling of the court on this motion which forms the ground of the first exception. 'This court has always regarded a *legitimate* rule of the court as prescribing a law to the court.' *Dunbar* v. *Conway*, 11 G. & J. 97; and in *Wall* v. *Wall*, 2 H. & G. 82, and *Gist* v. *Drakley*, 2 Gill. 346, this court has said there exists no discretion in an inferior court

to dispense with its own rules, or innovate on the established practice. The rules of court which are, by the decisions referred to, given the force of law, until wholly rescinded, are such rules as a court has the power to pass; *for a court cannot pass a rule which takes away from a party litigant a right positively secured by law.*" (Italics ours.)

In *Saylor* v. *Taylor*, 77 Fed. 476, the Circuit Court of Appeals of the Fourth Circuit had before it for consideration the effect of the following rule:

> "Among admiralty claims of otherwise equal dignity, the one first libeling shall be first paid, but petitioners shall be paid pro rata."

Under this rule, one of the parties in the trial court had been decreed precedence over other plaintiffs. In passing upon the effect of this rule, the court says:

> "Upon reason, upon principle, and upon authority, all of the same class and of equal merit should share equally; and the only question remaining is whether these rights can be displaced by Rule 4 of the District Court, above cited. We are of the opinion that this rule cannot have that effect. The right to make rules is given in section 918 of the Revised Statutes in the words following (citing statute).
>
> "By virtue of this section the courts may make rules of practice, *but they cannot create rules of law.* They cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the Statutes of the United States, or under the general maritime law, which these courts are created to administer, *are rules of property, and it is beyond the potency of judicial power to alter them, or take them away by rules of practice.*" (Italics ours.)

In *Hamilton, et ux.*, v. *Fowler, et al.*, 83 Fed. 321, the court says:

> "These rules of practice and procedure, if regulated by the statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time, and, when the statute says that 'the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court,' it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure. * * *."

In *Patterson* v. *Winn, et al.*, 5 Pet. 233, 8 L. ed. 108, the court was considering a rule which prescribed the method of proving lost instruments and providing that secondary proof of their contents could only be received in accordance with the rule. Proof of the instrument did not accord with the rule but did fulfill the requirements of the common law. In passing on the question, the court said:

> "We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; *and that it was not competent for the court to exclude it by its own rule.* However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general principles of law. The judgment must therefore be reversed and the

cause remanded to the Circuit Court with directions to award a *venire facias de novo.*" (Italics ours.)

In *St. Louis & San Francisco Railway Company* v. *McAllister*, 165 Pac. 1123, this court says:

> "Of course, courts have the inherent power, independent of any statutory provisions, to promulgate rules for the regulation of their practice and business; but they can make *no enforceable rule that contravenes a statute or the law of the land.*" (Italics ours.)

Gooduin v. *Bickford*, 93 Pac. 548, involved the validity of a rule of Oklahoma Territorial Court requiring that the plaintiff in error in an appeal from the probate court make a deposit of $5.00 to apply on the costs of the clerk of the District Court. In holding the rule repugnant to the statutes then in force, the court says:

> "We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and business, but they can make no rule that contravenes a statute or the law of the land. *Prendeville* v. *People of the State of Illinois*, 42 Ill. 217; *August Fisher* v. *National Bank of Commerce*, 73 Ill. 34; *Thomas Purcell* v. *Hannibal & St. Joseph Railroad Company*, 50 Mo. 504; *United States* v. *James G. Swan, et al.*, (D. C.) 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court, that a different rule from the one announced above applies, or that a court has control over the same superior to the legislative department of the government, and that a court may make a rule governing the

same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute. *Maggie E. Bradford* v. *Southern Railway Company*, 195 U. S. 243, 25 Sup. Ct. 56, 49 L. ed. 178.

* * * * * * *

"* * * We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for costs shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called appellant does not appear, the same may be dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute, and would be invalid."

The statute governing defaults in Ohio provided that "in an action upon an account or written instrument for the payment of money only or in foreclosure, judgment may

The Circuit Court of the United States, in Alabama, by a general rule adopted the practice of the state courts which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court unless with the consent of counsel. In this case bill of exceptions was signed by the judge of the Federal Court after the adjournment of court and without consent. In holding that this was sufficient although not complying with the rule, the court in *United States* v. *Breitling*, 20 How. 252, said:

> "But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the state, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules or to except a particular case from its operation, whenever the purposes of justice require it."

The Circuit Court of Christian County, Missouri, had a rule which required the defendant in a criminal case who desired witnesses in excess of a certain number to make application supported by affidavit setting forth the names of the witnesses and the facts which witnesses were expected to testify to. After quoting the bill of rights of the Constitution of Missouri and the statutes relating to process for witnesses in original cases, the court, in *State* v. *Gideon*, 119 Mo. 94, says:

> "The statutes are sufficient, if carefully and faithfully executed, to exclude the fees of all unnecessary witnesses; more severe than this, they ought not to be.
>
> "It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those

of other courts of last resort in the several states: *Hickernel* v. *First National Bank*, 62 Pa. St. 146; *Oates* v. *Mack*, 6 Col. 401; *State* v. *Posey*, 17 La. Ann. 252, 87 Am. Dec. 525; *Patterson* v. *Winn*, 5 Pet. 242."

There is an extended note to this case in 41 Am. St. Reports and the limitation upon the power to prescribe rules is discussed fully, beginning at page 641.

State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525, was a proceedings for mandamus and the plaintiff alleged that she had instituted suit for a money judgment and that the case, being ripe for default, she asked for a judgment and that judgment was refused. The judge responded that he had adopted a rule for the term and under similar circumstances would renew it at another term "that no cases should be tried except the criminal cases and matters of succession" and that he was induced to make this rule by reason of the distress of the people immediately following the civil war. The court, in granting mandamus, announced the rule as follows:

"In this case the judge has, without even a request from either party, arbitrarily forced a continuance. He has yielded to solicitations of persons, not parties, and deprived relatrix of the legal right of trial of her cause.

"The judiciary is not by the constitution invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.

"The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law-making power and not to the judiciary."

In *Suckley's Administrator* v. *Rotchford*, 13 Grattan 60, 65 Am. Dec. 240, it was said:

> "In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpoena issued, still, as the law directed otherwise, the law must prevail. Although the Supreme Court had authority to prescribe rules of practice in the Circuit Court, those rules must be subordinate to the law. Although Congress might have repealed or altered the law, yet it could not delegate that authority to another body."

The Superior Court of Cook County, Illinois, adopted a rule whereby an action *ex contractu* may be brought to trial out of its order upon the docket, upon the affidavit of the plaintiff of a belief that the defense is made for delay, unless it is made to appear by affidavit of facts in detail that the defense is made in good faith. The Supreme Court of the state, in *Fisher* v. *National Bank of Commerce*, 73 Ill. 34, held such a rule to be void and said:

> "And the defendant, in such case, to entitle himself to a trial *under the statute*, is only required to file an affidavit with his pleas, stating that he verily believes he has a good defense upon the merits, while *under the rule of the Supreme Court* he is compelled to make it appear to the court by affidavit of facts in detail, that the defense is in good faith. The practice, being regulated by law, must, under the Constitution, be uniform; and from whatever source the Superior Court

may have assumed to derive its authority to adopt the rule, inasmuch as it is *inconsistent with the general law*, it is void and of no effect." (Italics ours.)

If we are correct in our conclusion that Rule 9 is a rule of procedure only, and admitting that it is binding upon the County Courts and litigants in the sense that the latter have a right to invoke it, yet, if the rule is not invoked at the time, and during the course of a proceeding which results in judgment, can such judgment be afterwards collaterally assailed in an independent proceeding because the court and the parties to the transaction failed to observe the rule? The question, we think, should answer itself.

In a long line of decisions the Supreme Court of Oklahoma has construed certain statutes relative to the proceedings of probate courts in respect to infants and their property as directory only, a failure to observe which, while irregular and erroneous, is not fatal to the jurisdiction. Some of these cases decided prior to the time the rights in question here arose, are:

Spade v. *Morton*, 38 Okl. 384;
Eaves v. *Mullen*, 107 Pac. 433;
Hathaway v. *Hoffman*, 153 Pac. 184;
Baker v. *Cureton*, 150 Pac. 1060;
Sackey v. *Winstock*, 144 Pac. 372;
Parmenter v. *Ray*, 158 Pac. 1183;
Cowen v. *Hubbard*, 151 Pac. 678;
Cowles v. *Lee*, 128 Pac. 688;
Cabin Valley Mining Co. v. *Hall*, 155 Pac. 570.

These cases held that various statutory provisions, although just as mandatory in form and language as Rule 9,

are directory merely and did not affect the jurisdiction of the court.

In *Spade* v. *Morton* and *Eaves* v. *Mullen*, it was held that the faliure to conform to the statute requiring notice by advertising of all sales of an infant's real estate was not a jurisdictional defect. *Baker* v. *Carleton* and *Hathaway* v. *Hoffman* held that the failure to give notice of the appointment of a guardian, although the language of the statute in that respect is mandatory in its form at least, was jurisdictional.

In *Parmenter* v. *Ray* the provision of section 5285 of the Revised Laws of 1910 requiring that the probate court in the appointment of a special administrator *must* give preference to the person entitled to letters testamentary or of administration was held not to be mandatory but that in making such appointment the court may exercise jurisdiction, and the court refused to follow the case of *In re Mine*, (Montana) 38 Pac. 228, holding the contrary.

Cowen v. *Hubbard* held that a defective petition for the sale of lands gave the court jurisdiction and that a sale thereunder was not subject to collateral attack.

In *Welch* v. *Focht*, 171 Pac. 130, the Supreme Court, speaking through Justice RAINEY, summing up the doctrine announced in these cases, says:

> "Before we proceed further it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of the ward's real estate. As was observed in *Eaves* v. *Mullen*, *supra*, practically all the courts agree that there are many defects in the sale proceedings of a

ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional but we have adopted the other rule, and there are many compelling reasons unnecessary to be stated at this time, why we should not at this late day depart therefrom."

Probate courts for many years have acted in accordance with the doctrine established in this jurisdiction by the foregoing decisions. They have announced a principle that irregularities, errors, failure to observe some statutory provision, although mandatory in its language and form, do not affect the jurisdiction of the County Court so as to make its judgments and orders subject to collateral attack. In this state of the decisions it could hardly be anticipated by the parties to the transaction in question that the court would completely reverse itself and adopt that strict construction of the controlling statutes which by a course of decisions extending over many years they had refused to do. The Prairie Oil & Gas Company was justified in assuming that Rule 9, although having the force and effect of a state statute, would be deemed directory only and as a mere rule of procedure not affecting the jurisdiction of the County Court. Certainly it could never have anticipated that the Supreme Court would do what no other court has ever done, that is to say, promulgate a rule in pursuance of a statute giving it authority to make rules to carry into effect the statutes of the state, and then construe the rule as superior to such statute.

The statement in the *Winona* case that the probate rules grew out of, and were made necessary by the opinion in *Duff* v. *Keaton*, *supra*, is incorrect. These same rules were in force in most of the probate courts on the east side of

the state prior to their promulgation by the justices of the Supreme Court of Oklahoma. Their main purpose was to secure uniformity in the rules governing transactions relative to Indian lands and to fix certain specified dates upon which such matters would be heard so that the United States probate attorneys, who in many cases had to attend more than one court, might have an opportunity to be present and in order that the dates of hearing in the various counties over which he had jurisdiction might not conflict. One or two of the county judges would not agree to this plan, and it was for that reason the justices of the Supreme Court were appealed to for the purpose of making it obligatory on all the probate courts to adopt the same rules. It may be true that a public sale of leases, after notice, was the policy, both of the state courts and of the originators of the rules but in *distinct recognition of the power of the court to order a private sale under the statute* it was expressly provided in Rule 18 that *notice might be waived* unless it was a notice required by law, that is, by a statute of the state.

The case of *Winters v. Oklahoma Portland Cement Company*, 164 Pac. 983, cited in the *Winona* case in support of the court's conclusion has no application to the question. That case involved a substantive law—an act of the legislature taking away from the County Court its necessarily admitted *former discretion and power* to confirm a sale of a minor's land at private sale for less than ninety per cent of its appraised value. The act of the legislature was not for the purpose of regulating the procedure of such a sale, for in express and mandatory terms it prohibited it. Suppose such act had not been in existence; would the court then have had power by a *mere rule* to prohibit such a sale? And could the Supreme Court now by *rule* provide that a sale

for less than *ninety five* per cent of the appraised value should be valid notwithstanding the statute permitting its confirmation for *ninety* per cent? If the answer is that it could not do so because such a rule would be inconsistent with the statute, then of course the whole argument falls to the ground for Rule 9, if construed to *prohibit* a private sale, is inconsistent with the conceded, acknowledged and decided power of the court, prior to Rule 9, to direct a private sale.

Cabin Valley Mining Company v. *Hall, supra*, decided February 16, 1916, involved the making of a private contract between the only persons interested, the lessor and lessee, extending the term of an existing lease. The question in the case was as to whether a County Court had jurisdiction to authorize the extension of a lease theretofore made by a guardian to the lessee in that lease. The County Court in that case had authorized the guardian to make and execute a contract with the lessee of an existing lease, extending the term. It was held that the power and jurisdiction of the County Court, not being inherent, were to be determined by the constitution and laws of the state, and the conclusion was reached that, under the Constitution and Statutes of Oklahoma, the court had such power and that the grant of power embraced authority in these courts to afford such relief as was formerly administered by courts of equity in like matters. This court in *Tibbets* v. *Clayton*, 288 Fed. 393, called attention to the *Cabin Valley Mining Company* case, and other decisions of the State Supreme Court, establishing and recognizing the practice in County Courts in respect to extending the terms of existing leases without a public sale, and recognizing the jurisdiction of such courts in the premises.

The decision in the *Cabin Valley Mining Company* v. *Hall* case, which cited other decisions of the same court in support of its conclusions, was only four months old when the County Court directed the extension of the leases in question, and approved the terms of the agreement which had been reached between the guardian and the lessee, Los Angles Cherokee Oil Company. That decision had not been reversed or modified when The Prairie Oil & Gas Company purchased the leases so extended in April, 1917. True, Rule 9 was then in force, but could it be contemplated that the Supreme Court of the state would apply, or that it would have the power to apply, that rule so as to give it the effect of a mandatory statute of the state depriving the County Courts of their jurisdiction to do every thing which it was held in the *Cabin Valley Mining Company* case and other cases they had the power to do under the constitution and laws of the State? Could it be then supposed that the justices of the Supreme Court could, under their right to make rules of procedure, usurp the functions of the legislature, for that is really what *Winona* v. *Barnes* decided. We agree that the Supreme Court may prescribe rules of procedure for inferior courts and that it may enforce obedience to the rules, not only by parties to legal proceedings in these courts but by the courts themselves. But we cannot concede without doing violence to the principles upon which our form of government rests, the power of the Supreme Court, or its members, to declare that such rules cannot be waived by the parties interested, and that their strict observance is essential to the jurisdiction of the County Courts, a jurisdiction which they exercised, with the full approval of the Supreme Court, and by virtue of the constitution and statutes of the state, long before the rule was enacted, and which jurisdiction indeed the rule itself impliedly recognizes.

If then The Prairie Oil & Gas Company purchased these extended leases at a time when the state Supreme Court by its decisions, had recognized the authority of the County Court to grant the extension by its approval of a contract between the parties interested to that effect, and could not have anticipated that the existing rules were anything more than regulatory of the procedure, which might be waived, and could not affect a completed transaction in which all parties interested had acquiesced, and to which they had given their free consent, so far as the record discloses, then it acquired a vested property right of which it cannot be divested merely because the Supreme Court, subsequent to that time, has given to a rule of procedure the effect of substantive law, and has construed it to be mandatory and its observance a condition to the jurisdiction of the County Court. As said in *Haskett* v. *Maxey, supra:*

> "Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well understood exception. This exception is that: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment'."

The argument based upon *Ex parte Virginia*, 100 U. S. 313, that because the Supreme Court of Oklahoma decided

in *Freeling* v. *Kight*, 152 Pac. 362, that it had power to mandamus a probate court to recognize these rules, the decision necessarily amounted to a holding that the rules go to the jurisdiction of the probate court, is a *non sequitur*. The right to a superintending control of inferior courts is older than American civilization. It is that exercised for many centuries by the Court of King's Bench over the inferior tribunals of England. (2 Blanckstone, p. 111.) Such superintending control was for the purpose of keeping inferior courts within the bounds of their jurisdiction; certainly not to impair that jurisdiction. The provision of the Oklahoma Constitution quoted by petitioners that "the original jurisdiction of the Supreme Court shall extend to a general superintending control of all inferior courts and all commissions and boards created by law," was not the source of the power of the justices of the Supreme Court of Oklahoma to make rules for inferior courts. That power is granted to them by section 5347, Revised Laws of 1910, and in the preamble to the adoption of the rules they expressly state that the rules were made pursuant to that section. If it were true that the constitutional provision referred to was the source of power to make the rules in question, as intimated in the *Winona* case, then the legislature could not take away such constitutional power from them and could not legislate on that subject, as it attempted to do by the Act of April 4, 1919, Session Laws of Oklahoma, 1919, page 288. That position is contradicted by the action of the justices of the Supreme Court when, on June 11, 1917, they recognized the right of the legislature to legislate on the subject, by revising the rules so as to omit Rule 10, because "the matters regulated therein have been provided for by statute." (171 Pac. IX.)

The case of *Freeling* v. *Kight, supra,* is cited by petitioners as holding that a County Court is without authority to dispense with the probate rules. Of course the power of the Supreme Court to make a rule of procedure a matter of jurisdiction so as to take away the constitutional or statutory authority of inferior courts, is not determined merely by the claim that it has that power, so far as this court is concerned. But let us see what was involved in *Freeling* v. *Kight*. The County Court of Rogers County had, on June 5, 1914, adopted these same probate rules, which had in fact been suggested to all the probate courts by the Department of the Interior. After the promulgation of the rules by the justices of the Oklahoma Supreme Court, they were readopted by the Rogers County Court on July 15, 1914, and continued in force until July 4, 1915, when the county judge made an order vacating and setting them aside, and adopted other rules in conflict therewith. The state, on relation of Freeling, its Attorney General, applied for a writ of mandamus to compel the county judge to observe the rules. But there was not involved in that case the validity of any judgment or order of the court with respect to any matter pending before it, or any transaction completed with the consent or acquiescence of all parties in interest without a compliance with the rules. No construction or interpretation of the rules, or their effect, upon acts done by the court under them, was involved. The sole question presented was the right of the justices of the Supreme Court, under the statute referred to, to make and enforce obedience to its rules, prescribed "for the proper and expeditious conduct of the business of said court and other courts of record of said state." That right, even without an authorizing statute, may be conceded. That was the only thing which the

court was called upon to decide in the *Kight* case. It was the only thing which it did or could decide. The question here was in no way involved. The only observation of the court in that case which at all pertains to the question here was that a rule of court has the force and effect of law. We admit that, of course, in the sense that it must be obeyed by the parties interested in the subject-matter to which it applies. Either that court, or counsel here, has confused law in the substantive sense with law in the sense of regulation and procedure. The legislature has the power, for instance, to make a certain act criminal which otherwise would not be so, and to fix the punishment. But could a court, by a rule, make such a "law?" The court may by rule *regulate the manner of conducting a private sale* which is admittedly authorized by the Oklahoma Code—and which the state court has often recognized—and such a rule, of course, has probably the same force and effect as a statute of the legislature enacted *for the same purpose*. But the court could not by rule *prohibit* a private sale. Its power is to *regulate* the procedure in the doing of a lawful act, not to *prohibit* the doing of the act itself.

The statute, under which the Supreme Court justices acted in making the rules, makes it their duty to meet every two years during the month of June at the capital of the state "and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code."

—Section 880, Revised Laws, 1921

Now, one of the provisions of the code to which effect must be given is that the probate court has the right to order the private sale of a lease. That is necessarily so, both

under the statute and the prior decisions of the court. Any rule made by the justices must therefore give effect to such provisions; but the decision of the court in the *Winona* case is that the rule takes it away. The section quoted further provides that the justices of the Supreme Court "shall make rules consistent therewith as they may deem proper"; that is, consistent with the code. A rule taking away the very power given by the code, namely, the power to make a private sale, is certainly inconsistent therewith and in violation of the statute.

—*Beers* v. *Haughton*, 9 Pet. 329.

IV.

The second proposition urged by petitioners is that the extensions should have been set aside because of fraud in obtaining them.

The fraud charged in these cases was that the extensions of the leases were void for the reason that they were

> "procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly inadequate consideration, the actual value of the said agreement at the date thereof being not less than $175,000.00, while the consideration actually paid was only $18,000.00, the lands herein described as the allotment of the said William G. Twist, deceased, and covered by this action, being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to-wit: That the officer of the said Los Angeles Cherokee Oil Company having full and complete control of the operations of the company, and all its business was one

J. F. Pitt, and another of the said officers was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execuite her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment of the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his co-operation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and suggested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers, consented to the proposed agreement, and signed the papers prepared for her by the said officer of the said company. That to further lull the suspicions of the

guardian, and to present the appearance of fair dealing, the said Los Angeles-Cherokee Oil Company, through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of public sale was given, but plaintiffs aver that said notice is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and entered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles-Cherokee Oil Company to bid thereon." (R. 5, 6 and 7.)

The testimony of Leoria L. Twist Weldy, so far as it relates to the charge of fraud, is as follows:

Q. The Los Angeles-Cherokee Oil Company operated this property and produced oil from it?

A. Yes, sir.

Q. And each of the tracts, did they?

A. Yes, sir.

Q. After the period of operation was any inquiry made of you with regard to changing the form of the leases?

A. There was.

Q. When and by whom?

A. Well, at different times, by Mr. Pitt, also Mr. Anderson at one time.

Q. Mr. Pitt and Mr. Anderson to whom you refer were gentlemen associated with the Los Angeles-Cherokee Oil Company?

A. They were; they belonged to the company, stockholders.

Q. Do you remember how long before certain court proceedings were instituted they first begun to talk with you about the extension of these leases or the changed form of the leases?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial to any issue.

The Court: I will let it go in the record.

Mr. Davidson: Exception.

A. Well, it was in 1909, the first time they ever named it to me.

The Court: Who named it to you?

A. Mr. Pitt and Mr. Anderson were both together.

The Court: Who is Mr. Pitt?

A. He was a stockholder and foreman or something for the Prairie people.

Q. He had charge?

A. Yes, sir.

Mr. Davidson: It surely couldn't be material back as far as 1909.

The Court: No.

Q. Just prior to the institution of the court proceedings did Mr. Pitt or Mr. Anderson on behalf of the Los Angeles Cherokee Oil Company talk to you in regard to the changing of the form of the leases?

A. Yes, sir, Mr. Pitt did several different times for the last year or two before we did change.

The Court: Mr. Linebaugh, she signed a petition here which sets out these facts. I don't see the relevancy of any conversation she had with them.

Mr. Linebaugh: Well, to show why she filed the petition.

Q. You filed a petition with the County Court of Tulsa County asking that the form of these leases be changed or the terms be changed?

A. Yes, sir.

Q. Who prepared that petition?

A. Well, I think that Mr. Rice & Lyons. I am not sure.

The Los Angeles-Cherokee had them prepared themselves.

Q. Where were you when you signed the petition, if you remember?

A. I think I was at home.

Q. Who brought the petition to your home?

A. Mr. Pitt.

Q. Why did you sign the petition?

Mr. Davidson: We object to that.

The Court: I will see what her answer is.

A. Well, there was various reasons.

Q. Tell the court what those were.

A. Well, kind of fear, to be positive.

The Court: Fear?

Q. Fear of what?

A. Well, I had been getting letters from different oil companies around me——

The Court: Oh, well; I will exclude that.

Mr. Linebaugh: I think probably this will be of some importance, your honor.

The Court: Why?

Mr. Linebaugh: The fact that she had received letters saying that they were going to put vacuums on wells adjacent to her property. Mr. Pitt says if vacuums are put on we will have to put vacuums on and that will draw all the oil out very quickly and you had better take this $18,000.00. But we will show immediately after she filed this petition those letters stopped coming and no vacuum was put on.

The Court: I will let it go in and hold against you on it.

Mr. Linebaugh: That is merely one of the circumstances.

The Court: If that is all you have got.

Mr. Linebaugh: No, that isn't all, your honor.

The Court: That is a reflection on her as guardian. Who was your attorney, madam?

A. I didn't have any to represent me at that time, they done all the work themselves. I was in very poor health. I had had one but I didn't have any right at that time because they said it wasn't necessary, they would fix the papers all themselves.

Mr. Davidson: Did Mr. L. J. Martin represent you?

A. No, not at that time.

Mr. Linebaugh: We offer to prove——

The Court: Don't offer to prove, but put it in there.

Q. You may go ahead with the statements, if any, that were made——

The Court: Statements made by Mr. Pitt. The letters are the best evidence of what they contained.

Q. What statements, Mrs. Weldy, if any, did Mr. Pitt or Mr. Anderson make to you at the time they were discussing with you the question of changing the form of the leases with regard to the installation of vacuums on the wells?

Mr. Davidson: We object to what Mr. Pitt says. Her evidence is, Mr. Pitt was foreman.

The Court: She testifies Mr. Pitt came to her to get her to sign the extension. If he made any negotiations that would be evidence that he was acting for his company.

Mr. Linebaugh: You may answer.

A. Well, he said that if the other companies put those vacuums in they would soon kill the life of the wells, and also when he was wanting me——

The Court: Now, let me ask you a question. If you didn't extend the leases you would get the wells back, wouldn't you?

A. Certainly.

The Court: Then you could have had vacuums put on or made arrangements?

A. Yes, but if they had put them on they would have killed those wells before we got them back.

The Court: They would have forfeited the leases if they hadn't.

Mr. Linebaugh: Those are facts, we know, but she didn't.

The Court: Yes, but it was her business to go to her counsel. If you are going to have such clap trap as that, then no contract is sacred.

Q. What, if anything, did Mr. Pitt tell you would be the effect of placing vacuums upon the wells?

Mr. Davidson: We object to all this.

The Court: I am going to let them put it in and hold against them.

A. They said it would suck all the oil out of the ground. He said if we don't the other companies will get the oil.

The Court: That is no false statement. That is a fact. She had her rights. If they failed to produce the oil she could go and have it cancelled.

Q. Mrs. Weldy, at that time were you having any difficulty with reference to your bond as guardian?

A. Well, I was under surety bond which was costing me quite a bit.

Q. What statements, if any, with regard to your bond did Mr. Pitt or Mr. Anderson make to you during the period of these negotiations for the change of the terms?

Mr. Davidson: We object to that.

The Court: I sustain the objection. The Prairie Oil & Gas Company couldn't have had notice of such as that.

Mr. Pinson: The burden would be on the defendant to prove good faith.

The Court: No, not in that.

Mr. Linebaugh: We will offer to prove by this witness that during this negotiation Mr. Pitt and Mr. Anderson discussed with her the question of her bond and inability to continue it and avowed their willingness to make her bond so that she could retain the guardianship for such amounts as would be necessary, providing she would consent to, accede to their request to sign the petition for the extension of the leases, and subsequently they did in fact make her bond ——

The Court: Suppose they did?

Mr. Linebaugh: Becoming surety and that—that was—well, I am making an offer—and such bond with Anderson and Pitt as sureties was filed in the County Court of Tulsa County and was of record at the time of the purchase by The Prairie Oil & Gas Company.

The Court: Suppose they did go on her bond, what effect would that have? How could that constitute fraud?

Mr. Linebaugh: It would constitute fraud when taken with the other circumstances, it seems to us.

The Court: I exclude that evidence. She says she had difficulty with her bond and they said they would help her make it. What is wrong about that?

Mr. Linebaugh: They are using that as an inducement, saying we will agree to make your bond, providing you will do this for us.

The Court: No, I don't think that is competent.

Mr. Linebaugh: We except

Mrs. Webb ——

The Court: I will see what she has to say. You say Mr. Pitt come to you about signing the petition?

A. Yes, sir.

The Court: What did he say to you?

A. Well, of course, he asked me if I wouldn't make a commercial lease, is what he called it; he didn't say anything about a transfer. I told him "Mr. Pitt, I don't care to, because while I am under the Departmental lease we have the protection of the Department." He says, "You have the protection of the whole state under a commercial." I says that wouldn't be much when I had it; no, I don't feel like making that. He made the remark: "You have always done the best for your children in every way." He says, "Do you think by refusing this offer that you are still doing right by your children?" And he says, "Do you think that the court will think that you are doing right?" Of course, I studied about it, and I told him I didn't know what the court would think. He says: "You know there have been a good many guardian seekers' eyes on your minors all the time." And of course when he made that remark it throwed a kind of fear over me that they might try to take the guardianship away from me. That is one of the things that caused me——

The Court: Never mind. What else was said?

A. I don't remember every detail. I told him I didn't like to accept it, but of course I did. He went up and got the papers.

The Court: He told you he would give $18,000.00 for a new lease; is that what he said?

A. For a commercial lease.

The Court: Well, that would be a new lease. Then you signed this application, a copy of which has been offered here?

A. Yes, sir.

The Court: Go ahead.

Q. What statements, if any, did he make to you with reference to the value of the property?

The Court: Don't make suggestions.

A. Well, I told him I didn't think it was enough. He says, "Sure it is enough; it is really more than the leases are worth." And that is when he come over it again. He says, "Do you suppose that the court will think that you are still doing the best for your children if you refuse that?" And that is about all of it that I can remember.

Q. Did you subsequently, after filing the petition, go to the County Court room in Tulsa?

A. Yes, sir.

Q. Who, if any person, accompanied you?

A. Mr. Pitt come and taken me in his car.

Q. Was anyone with Mr. Pitt, or did just the two of you go?

A. I won't be positive, but there was no one went up to the court house with us. I think the other parties were already there.

Q. What other parties?

A. There was one attorney there and I don't know whether it was Rice or Lyons because I was not acquainted with them at the time.

Q. When you got to the court room what happened?

A. Well, Mr. Pitt taken the papers up to the judge.

The Court: You mean he had the papers with him?

A. He had papers with him.

The Court: Why, the petition you filed was in court, wasn't it?

A. He went up and talked to the judge a few minutes.

Mr. Linebaugh: This was on the day of the confirmation, your honor.

The Court: Yes, but the petition she signed would be a part of the court files.

Q. Were you ever in the County Court room concerning this matter except this one time?

A. No, sir.

The Court: You were there when they had the hearing and the judge determined to permit you to make a commercial lease; were you present then?

A. I think the papers were signed at my own house and taken up by them.

The Court: They had been signed but on the day of the hearing you appeared in court and the court granted you authority to make a new lease?

A. It was all done at the same time.

The Court: That was the time you appeared before the court, wasn't it?

A. Yes, sir.

The Court: Judge Ramsey?

A. Yes, sir; Judge Ramsey.

The Court: And Judge Ramsey talked to you about that?

A. Very little. He asked me if I thought I was doing for the best interest of my wards. I told him I did, owing to the conditions surrounding. He said, "I am satisfied that you are; you always have done such." And he says, "I, in my own mind, think it is best." And that is about all that occurred in the court room that day.

Q. Had you signed the papers at that time?

The Court: When did you sign the new lease, there in the court that day?

A. I won't be positive whether I signed it there. I know we went on up to their attorney's office and there was some papers signed there.

Q. Was there any evidence taken in the court room, that

is, were any witnesses sworn and their testimony taken?

A. No, sir.

Q. Were you sworn and your testimony taken or just these questions asked you at the judge's bench; was there any auction sale conducted in the court room?

A. No, sir, not while I was there.

The Court: Well, do you know whether there was any other evidence taken before the judge?

A. There were none taken while I was there. There were no questions asked anyone else while I was there.

Q. Did the judge sign the order while you were standing at his bench there?

A. Well, the judge signed the papers right there.

Q. While you were standing at the desk?

A. Yes, sir.

Q. And then you think you went up to Rice & Lyon's office?

A. Yes, sir.

Q. And possibly signed some papers up there?

A. I know I signed something, some papers.

Q. Now, was there any auction sale while you were standing there at the judge's desk?

A. No, sir.

Q. Or any bidding while you were in the court room?

A. No, sir; there was nothing said to that effect.

Q. Nobody asked if anybody wanted to bid?

A. No, sir.

Q. How long were you in the court room altogether?

A. Well, we wasn't there very long. Of course, there were one or two parties ahead of us to see the judge and we had to wait until they were through. I don't think we were in there over thirty minutes at the outside.

Q. After the judge signed the paper at his desk how long did you remain in the court room?

A. Just a few minutes.

Q. Who went out with you?

A. Mr. Pitt and the two attorneys.

Q. Was that the only time you were up in the County Court room concerning the sale of this commercial lease, as you term it, or extension lease?

A. It was.

Q. Now, had you any conversation with your son, Albert T., with regard to the guardianship?

A. Yes, sir; we talked it over several times.

Q Before you signed the petition?

A. Yes, sir.

Q. What statements, if any, did he make to you——

The Court: Never mind about that. Do you object to that?

Mr. Davidson: Yes, sir, we object to all this.

The Court: I sustain the objection to that.

Mr. Linebaugh: Will the court permit me to finish my question so as to make my offer?

The Court: No, that is not the rule in the Federal Court.

Mr. Linebaugh: I will ask it this way, if I may, your honor:

Q. Did your son, Albert T., tell you of certain statements which Mr. Pitt had made to him concerning your guardianship?

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: We except.

Q. Mrs. Weldy, the $18,000.00 offer which Mr. Pitt made, what was that for?

A. Well, it was for the making of a commercial lease, he said.

Q. On what properties?

A. On the W. G., Albert T., Jesse L. and Edward C.

Q. That was four separate allotments, were they?

A. Yes, sir.

The Court: He said he would pay as much as $18,000.00 for a commercial lease on these allotments; that is what he meant by an offer, isn't it?

A. Yes, sir.

Q. Now, who, if you know, made—if there was any division of that $18,000.00 made as applying to each of the separate allotments, who made it?

Mr. Davidson: If the court please, we object to that.

The Court: Yes, I sustain the objection. The record shows what was done.

Q. Who, if any person—well, I will ask you this: Prior to the petition being brought to you for your signature by Mr. Pitt, was the method of division and amount of the division of the $18,000.00 discussed and agreed upon between you and Mr. Pitt?

Mr. Davidson: We object to that; wholly incompetent.

The Court: I sustain the objection.

Q. Was any separate price ever suggested by Mr. Pitt or agreed upon between the two of you as to the separate allotments?

A. No, sir.

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: Exception. That is all.

Cross Examination by Mr. Davidson.

Q. You say you had no lawyer?

A. I didn't have anyone representing me at that time.

Q. Did you have a man named Robertie?

A. I didn't at that time.

Q. You didn't go to see him?

A. No, sir.

Q. You didn't go to see him?

A. No, sir.

Q. He was your attorney?

A. Yes, sir.

Q. Didn't you employ L. J. Martin?

A. Not in this.

Q. Didn't L. J. Martin go up to the court with you the time Judge Ramsey had this hearing?

A. If he did, I do not remember it.

Q. You never employed Mr. Martin?

A. Mr. Martin did do work for me.

Q. When, after that or before that?

A. Well, before and some after that. He made the final reports for the two children when they became of age.

Q. Do you say now you didn't go with Robertie or Martin?

A. No, sir.

Q. You didn't go to any attorney at all?

A. Mr. Pitt came down and we had the talk and he said it won't be necessary for you to pay any attorney fee.

Mr. Linebaugh: Won't you let her complete her answer?

The Court: I excluded that because it is not responsive to the question.

Q. You signed this petition and swore to it, didn't you?

A. Yes, sir.

Q. Over six years ago?

A. Well, it was when the lease was being made.

Q. And there has been nothing to prevent your coming to court with this matter within the last six years?

A. The children, when they became of age, took it up.

Q. But you still represent three minor children?

A. I do.

Q. You have an interest in William G. Twist's land as his widow?

A. I have a third interest.

Q. And you are getting your share of the one-eighth royalty from that lease?

A. Yes, sir.

Q. And have been all the time?

A. Yes, sir.

Q. And you have filed no suit for yourself?

A. I have filed no suit.

Mr. Davidson: I believe that is all.

Redirect Examination by Mr. Linebaugh.

Q. Mrs. Weldy, why didn't you get an attorney in these proceedings?

A. Well, I don't know, only just I didn't, and Mr. Pitt said he didn't think it would be necessary, they would take care of that.

The Court: He told you that he had an attorney?

A. He didn't come right out and say that; he just said they would take care of that.

The Court: Said they would have the papers fixed up?

A. Yes, sir.

Recross Examination by Mr. Davidson.

Q. There was an agreement there wasn't there that this royalty was to be increased from 10% to 12½%?

A. There was.

Q. And that was part of the consideration?

A. Yes, sir.

Q. And ever since that time an eighth royalty has been paid?

A. Yes, sir.

The Court: How long before the fifteen-year lease had expired when this agreement was made?

Mr. Linebaugh: About two years, your honor. (R. 44-53.)

The court did not by its decree affirmatively find that there was no fraud but it did unequivocally state its conclusions upon the subject in ruling upon the evidence introduced, or offered to be introduced by the plaintiffs.

The assignments of error, as the Circuit Court of Appeals said, disclose that the claim is made by petitioners that the court erred *(1)* in admitting evidence, *(2)* in excluding evidence, *(3)* in refusing to enter judgments for plaintiffs, *(4)* in making findings not supported by the evidence, *(5)* in refusing to make other findings.

The only exceptions to the rulings of the court on the admissibility of evidence was in two instances, namely: they offered to prove by Mrs. Weldy that during the negotiations between her and Los Angeles Cherokee Oil Company for the extension of the lease, Mr. Pitt and Mr. Anderson, its representatives, avowed their willingness to become sureties on her bond as guardian if she would sign a petition to the court for an extension of the lease (R. 47), and

the refusal of the court to permit Mrs. Weldy to testify as to conversations she had with her son, Albert T. Twist, with regard to the guardianship prior to the time she signed the petition for an extension of the leases (R. 50, 51). The assignments of error do not go to these specific rulings.

The argument in support of the claim of fraud is substantially: that Pitt and Anderson, the representatives of Los Angeles Cherokee Oil Company, became Mrs. Weldy's bondsmen in Mrs. Weldy's guardianship case for the purpose of influencing her decision to petition the County Court to approve the extension of the leases; that they stated to her that the amount proposed to be paid was more than the leases were worth, and that she would not be doing right to reject the offer, and that the County Court would not look favorably upon such refusal on her part, and that she was led to fear that the County Court might remove her and place the affairs of her children in the hands of strangers. All this is urged in support of the allegation that the extension of the leases was procured by the "fraud, duress and false dealing of Los Angeles Cherokee Oil Company."

It is not necessary to argue here that this does not amount to fraud or duress, even if Mrs. Weldy was the sole judge of the expediency of extending the term of these leases. So far as her rights as the widow of William G. Twist are concerned she is making no complaint, and has instituted no suit in her own behalf. As to the rights of her wards the probate court is the tribunal to determine whether it was for their best interests to have the terms of these leases extended. That court could have made such an order upon the petition of the lessees even if the guardian had refused to file a petition for that purpose, if it was con-

vinced that such extension was for the best interests of the ward. The Oklahoma statute gives the probate court making the appointment of a guardian "exclusive jurisdiction to control him in the management and disposition of the person and property of his ward." (Section 6583, Compiled Laws, 1921.) No fraud is alleged, or attempted to be proven, as having been perpetrated upon the court. As we have seen, the expediency of extending the leases was submitted to the probate court having jurisdiction of the guardianship of the minor lessors, and the court approved such extension. These suits, so far as they are based upon fraud in procuring the extension, are a collateral attack upon the judgment and order of the probate court.

By her petition filed in the probate court Mrs. Weldy, as guardian, represented that the original leases were made for a definite period, without proper regard for the best interests of the lessor and lessee. She set out the condition of the leases, the amount of oil being produced from each lease, the amount of oil accruing to the lessors, to-wit, ten per cent of the oil produced, and that Los Angeles-Cherokee Oil Company had offered to increase the royalty from ten per cent to twelve and one half per cent, and to pay to her for the benefit of herself and her wards, as their interests in the land may appear, an agreed sum of money, and praying that she be permitted to enter into an agreement to extend the term of each of said leases for a period so long as oil or gas shall be found therein (R. 10, 11). There is no intimation that any of the statements in that petition were untrue. The order of the probate court, pursuant to the notice and hearing, recites, as we have already shown, that the court heard evidence and found and approved the consideration for such extensions, and that the proposition was bene-

ficial and for the best interests of the minors. We must assume, in this suit, that the probate court performed its full duty and made such investigation as it deemed proper and necessary in order to determine whether the consideration was adequate and whether the extensions of these leases was for the best interests of the wards. Its orders and judgment in the premises cannot be collaterally impeached. There is no allegation or intimation that the Los Angles Cherokee Oil Company did not perform the conditions of the extensions approved by the court, or that the bonus money was not paid, or that the royalties were not increased, or that the wells were not drilled.

Petitioners indulge in many fine-drawn criticisms of the proceedings, which criticisms appear to be rather an afterthought, and not the basis of attack upon the transaction by the pleadings. They complain that the $18,000.00 was prorated according to the production of the different tracts, and that this was an arbitrary agreement without regard to the value of the extensions and could not determine their value, and say that such an arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, and the extent of the undeveloped acreage on each tract. But there is no evidence as to the proper method of determining the value of the rights acquired by Los Angeles Cherokee Oil Company. So far as the proof is concerned, the parties, and the probate court, may have taken into consideration the very data suggested by petitioner. The fact that a lump sum of $18,000.00 was offered as a bonus, instead of so much for each extension, is no evidence of fraud or unfair dealing. In effect the Los Angeles Cherokee Oil Company made a bid of so much for each extension according to the basis of di-

vision agreed upon, aggregating $[illegible], and which was approved by the court.

Petitioners also claim that the bonus of $[illegible] was the sole consideration. But this is not true, and indeed it may have been the least important. One of the motives inducing the sale may have been the fact that if the leases had not been extended the lessee could remove its equipment, for, of course, it could not have been compelled to sell that equipment to any other lessee. The removal of such equipment, it is obvious, would injure the wells on the land, possibly irreparably. An extension of the lease to the same operator would obviate that danger. The discrepancy between the bonus paid for the extension and the price later paid for an assignment of the extended leases by Los Angeles Chevalier Oil Company to The Prairie Oil & Gas Company, if material at all, can be explained by the circumstance that The Prairie Oil & Gas Company bought the whole property, including the lessee's equipment, which, of course, could not have been taken into consideration in estimating the value of the extension. The value of a lease with the operating equipment in place and being used, is one thing; the value of the same lease, dismantled of its operating equipment, is quite a different thing. Certainly The Prairie Oil & Gas Company had the right to assume that the probate court, in approving the extension, had determined the adequacy of the consideration. Surely it was not bound to inquire whether fraud had been practiced on the court in obtaining its judgment. The estimate of the oil still recoverable from the land is a matter of speculation at best; the probability of new oil sands, which may be indicated by the drilling of new wells, either on the leased tract or upon adjoining land, different or improved methods of extraction,

the skill and experience of the operator; and, it may be, greater economy in management, wider knowledge of markets, and better marketing facilities, are all to be taken into account in arriving at the price which the purchaser is willing to pay for a producing lease. Indeed there are too many elements to be considered in determining the prospective value of an oil and gas mining property at a given time—fluctuating as such values must necessarily be—to make the mere fact of a discrepancy between a price paid to a land owner for an extension of the fixed term of an existing lease, and that paid eight months later for the whole interest and estate of the lessee, any criterion whatever on the question of fraud based on inadequacy of consideration. The argument as to the comparative amount of production, and the current market price of oil, at the two periods, is too narrow in its scope and is wholly insufficient as a predicate for the cancellation of these extended leases on the ground of fraud. As this court has said in *The Atlantic Refining Company v. Bowne*, 94 F. [illegible]:

> "Cancelling an executed contract is an exercise of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear."

In *Mercer Land Trust v. [illegible]*, 121 F. [illegible], this court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to restrain written instrument for fraud or a mistake in the execution of the written instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon

a bare preponderance of the evidence which leaves the issue in doubt."

The court further said:

"If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

And so we say in this case that the doctrine is all the more applicable to an attempt to cancel a completed contract, approved and confirmed by a court which had complete jurisdiction of the subject matter and the parties involved.

Counsel say that the agreement to drill an additional well on each of the leases within six months, was no consideration because that was an agreement to do that which they were already bound to do. In this they are mistaken. The lessee in an oil and gas lease is bound, within the time prescribed in the lease, to drill at least one well, and that is because of his duty to explore the land by such means. But upon the discovery of oil he is under no obligation to continue the drilling of other wells unless they would be profitable.

Brewster v. Lanyon Zinc Co., 140 Fed. 801;
Watchorn v. Kansas Pet. Co., 5 Fed. (2d) 636.

The absolute promise to drill an additional well on each of these leases within six months, whether conditions then indicated a loss to the lease owner and a benefit only to the owner of the land, can hardly be said to be no consideration.

It is also said that the increase in royalty was "but another subterfuge and pretended consideration" because the leases were governed by the regulations of the Department of the Interior, and that such regulations prescribed that after May 1, 1908, the maximum rate of royalty shall be twelve and one-half per cent. But while these leases were under the jurisdiction and supervision of the Department of the Interior at the time they were originally executed, it is obvious that at the time of the proceedings in the probate court the Indian lessors and their allotments had been released from Departmental control, for, otherwise, it would have been necessary to have the Department approve the modification of the leases, and the extension of the terms, and no such claim is made.

Even if the allegations of the complaints and the proof offered in support of them amount to fraud, such fraud was intrinsic. It inhered in the judgment of the court. What the court had to determine was the necessity or expediency of the extensions; whether it would be for the best interests of the wards to have that done; and whether the offer made for the extensions of the leases was an adequate consideration for such privileges. The probate court determined these matters upon the hearing. They were necessarily the subject of its investigation. The judgment must be regarded as the deliberate act of the court. (*Weaver* v. *Van de Venter*, 19 S. W. 889.) That the guardian may have been induced to sign her petition, if that be true, by the promise of the lessee's representatives that they would become sureties on her bond, surely bears no resemblance to fraud. Their statement that the court might remove her if she did not consent to such extension, and that she did not need an attorney, are perfectly consistent with good

faith on their part, and the fraud must be such as to be utterly repugnant to honest intentions. (*Hardeman* v. *Donaghey*, 54 Sou. 172.) In any case these representations were not sufficient to vitiate the judgment, for the probate court determined that the guardian's action in the premises was the right and proper thing to do. A judgment can only be set aside for fraud when the proof of it is clear and convincing, and when the fraud is the basis of it, and but for which fraud it would not have been rendered.

Holton v. *Davis*, 108 Fed. 138;
Doughty v. *Doughty*, 27 N. J. Eq. 315;
Boyden v. *Reed*, 55 Ill. 458;
Ely-Walker Dry Goods Co. v. *Smith*, 160 Pac. 898;
Ray v. *McKnight*, 183 Pac. 489;
Hardeman v. *Donaghey*, *supra*.

In *Scott* v. *Gupsy Oil Co.*, 239 Pac. 887, it was held by the Supreme Court of Oklahoma that the question of the inadequacy of the purchase price of a lease of a minor's lands was an issue involved in the course of the proceedings for the sale, and that the judgment of confirmation precludes inquiry into the subject in a collateral proceeding. The court in its opinion said:

> "This court, in numerous cases, has held that the sale of a minor's interest in real estate, the determination by the County Court of the necessity therefor, and the adequacy of the consideration, are conclusive in a collateral proceeding, in the absence of fraud extrinsic to the record, and are impervious to collateral attack, and the scope of inquiry in a collateral attack is confined to the consideration as to whether the County Court had jurisdiction of such proceedings. *Welch* v. *Focht*, 67 Okl. 275, 171 P. 730, L. R. A. 1918 D, 1163;

Tiger v. *Drumright, supra.* To the same effect: *Brown* v. *Trent*, 36 Okl. 239, 128 P. 895; *Bowling* v. *Merry*, 91 Okl. 176, 217 P. 404; *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924."

In *Brooks* v. *Tucker*, 201 Pac. 645, the same court said in respect to the duty and power of a probate court in that state:

> "The law contemplates that the court must be satisfied from credible testimony adduced on the hearing of the return of the sale that the same has been conducted in accordance with the statutes and a fair value paid for the property, and the decree confirming the sale is a solemn judgment of the court vouching for the truthfulness of all of the essential facts necessary to constitute a valid sale. Purchasers in dealing with this class of land have a right to assume that the court has faithfully performed his duty."

In *Harrell* v. *Prairie Oil & Gas Company, supra*, the Circuit Court of Appeals said with reference to the sale of an extension of a lease claimed to have been given for a grossly inadequate price:

> "But conceding for the sake of argument that the lease was worth a great deal more than appellee's bid, that fact standing alone did not entitle appellant to a decree. The sale of the lease on June 19, 1916, was a judicial sale by a court having plenary jurisdiction over the parties and the subject matter. *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924; *Abraham* v. *Homer*, 102 Okl. 12, 226 P. 45; *Tucker* v. *Leonard*, 76 Okl. 16, 183 P. 907; *Thaw* v. *Falls*, 136 U. S. 519, 548, 10 S. Ct. 1037, 34 L. ed. 531. That sale was confirmed by the court, and it is the established rule that after confirmation there can be no cancellation of the sale solely on the

ground that the price bid was inadequate. In *Morrison v. Burnette*, 154 F. 617, 624, 83 C. C. A. 391, 398, this court said:

> 'Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids'."

V.

But respondent asserts by its answer that it is a bona fide purchaser. In its answer it alleges that at the time of its purchase of the assignment of these leases from the Los Angeles Cherokee Oil Company on March 5, 1917, it paid to it more than a thousand dollars; that the consideration was bona fide and actually paid; that at the time of paying the consideration and at the time of the delivery thereof it had no notice or knowledge of the various transactions and representations alleged and set forth in the petition of the plaintiffs between its assignor and their guardian, and had no notice and knowledge of any proceeding and transactions relative to the modification and extension of said leases other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, and avers that its purchase and the payment of the consideration was in reliance upon the apparent legal title of the Los Angeles Cherokee Oil Company as shown by the public records. (R. 31.)

It was admitted on the trial that Dana H. Kelsey, who was unavoidably absent, would, if present, testify that he acted for the Prairie Oil & Gas Company, in connection with Fred S. Cook, and conducted the negotiations for the purchase from the Los Angeles Cherokee Oil Company of these Twist leases with other leases; that there was paid for them the following sums: For the William G. Twist lease, $112,561.61; for the Edward C. Twist lease, $49,377.38; that at the time of completing such purchase and paying the moneys and taking the assignments "he had no notice or knowledge of the transactions alleged by the petitions to have occurred and alleged to have taken place between the officers or agents of the Los Angeles Cherokee Oil Company and Leoria L. Twist (Mrs. Weldy), guardian, in connection with the agreement to extend the leases, but that he purchased these leases on behalf of the Prairie Oil & Gas Company subject to an examination of the abstracts furnished the Prairie Oil & Gas Company, and that in such transaction H. B. Anderson and a man by the name of Pitt represented the Los Angeles Cherokee Oil Company, and that neither of said persons referred to or informed him concerning any matters, conversations or transactions between the Los Angeles Cherokee Oil Company and its representatives and Leoria L. Twist Weldy." (R. 39-40.) Counsel criticise the stipulation as insufficient to support the plea of bona fide purchaser. They say that there is no evidence in the record that Fred S. Cook was unaware of the nature of the transactions or of the conversations between Pitt and Anderson and the guardian. But the stipulation was that Dana H. Kelsey was the representative of the Prairie Oil & Gas Company. What Fred S. Cook's connection was with that transaction, is not disclosed, and we

therefore cannot assume that even if he knew of these conversations and transactions his knowledge would bind the Prairie Oil & Gas Company. But the real criticism of counsel is that the known facts were sufficient notice that "some improper activities had existed" because the Prairie Oil & Gas Company knew that it was paying very much more than the $18,000.00 which had been paid for the extension of these leases seven or eight months before, and that therefore with this positive knowledge of the discrepancy in the prices paid it could not contend that it was in the exercise of good faith. We have already called attention to the fact that the price paid by the Prairie Oil & Gas Company to the Los Angeles-Cherokee Oil Company was for the whole property, including the equipment and that such discrepancy is not a criterion for determining the existence of fraud. Furthermore, the probate court in approving the transaction necessarily determined the adequacy of the consideration. Was it the duty of the Prairie Oil & Gas Company to make inquiry whether fraud had been practiced on the court? As said in *Meehan* v. *Williams*, 48 Pa. St. 238, "what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

In *Wilson* v. *Warr*, 6 Wallace 83, this court said:

> "The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

This court also said in *Townsend* v. *Little*, 109 U. S. 54:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."

Respectfully submitted.

THOMAS J. FLANNELLY,
A. A. DAVIDSON,
Attorneys for Respondent, The Prairie Oil & Gas Company.

WEST, GIBSON, SHERMAN,
DAVIDSON & HULL,
Of Counsel.

Office Supreme Court, U
FILED
JAN 19 1927
WM. R. STAI.SE
CL

No. 302

In the Supreme Court of the United States

October Term, 1926.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

VERSUS

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

THOMAS J. FLANNELLY,
A. A. DAVIDSON,
Attorneys for Respondent.

WEST, GIBSON, SHERMAN,
DAVIDSON & HULL,
Of Counsel.

INDEX.

PAGE

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld. 1

Propositions of Petitioners. 6

Propositions of Respondent. 7

I. The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved. 8

II. *(a) Carlile* v. *National Oil & Development Company* and *Winona Oil Co.* v. *Barnes*, decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules. *(b)* The order and judgment of the probate court approving the transactions involved, made in the exercise of a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved. 15

III. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of pro-

PAGE

cedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived. 103 104

IV. *(a)* The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contract. *(b)* The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding. . . . 53 54

V. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud. 82

AUTHORITIES CITED.

Adams Express Co. v. Texas, 35 Wall. 67 39
Anderson v. Santa Anna T. P., 103 U. S. 303 96
Anderson v. Santa Anna, 116 U. S. 356 ..... 94, 99
Anderson v. Anderson, 119 Penn. 495 88
A. & G. W. R. R. v. Gaudy, 149 U. S. 301 96
Baker v. Cincinnati, 130 Penn. 1000 ..... 32, 67, 69
Bates v. Houghton, 9 Peters 329 35
Bingham v. Reed, 55 Ill. 450 90
Brewster v. Lincoln Fire Ins. Co., 109 Penn. 208 79
Brooks v. Tucker, 108 Penn. 603 82
Burgess v. Salomon, 106 U. S. 89 ..... 85, 89
Calico Rock Mining Co. v. Wolf, 133 Penn. 329 ..... 32, 67, 68
Carlisle v. National Bank of Ga., 92 Penn. 59 88
Compiled Laws of Oklahoma, 1893, Sections 1850 and 1852 ..... 68, 70
Compiled Laws of Oklahoma, 1893, Section 4063 70
Crown Point Iron Co. v. Cheever, 114 U. S. 360 7
Crowe v. Wilkins, 134 Penn. 670 ..... 67, 69
Cuyler v. Ins. Co., 120 Penn. 498 67
Dubuque, Sioux C. & P. R. R. Co. v. Perry, 19 Wall. 30 39
Dunphy v. Dunphy, 14 N. J. Eq. 415 90
Douglass v. County of Pike, 101 U. S. 677 94
Duff v. Newton, 124 Penn. 290 ..... 76, 79, 80
East Alabama Railway Co. v. Doe, 114 U. S. 340 94
Eaves v. Mullin, 102 Penn. 433 ..... 66, 67
Elk Mountain Ditch Co. v. Smith, 100 Penn. 206 82
Equitable Life Assurance Soc. v. Brown, 187 U. S. 308 6
Ewart v. Robinson, 109 Penn. 240 5
Federal Criminal Law v. Ex parte Rapier, 143 U. S. 110, Appendix, 52 L. Ed. 781 35
Fidelity v. National Bank of Cincinnati, 53 Ill. 129 90
Fillebrown v. North 94, 96, 99

AUTHORITIES—Continued.

	PAGES
Gates, et al., v. *Mack*, 6 Col. 401	34
Gelpcke v. *City of Dubuque*, 1 Wall. 175	16
Gibson v. *Lyon*, 115 U. S. 439	15
Goodwin v. *Bickford*, 93 Pac. 548	40
Gormerly v. *McGlynn*, 84 N. Y. 284	34
Hamilton, et ux., v. *Fowler, et al.*, 83 Fed. 321	39
Hardeman v. *Donaghey*, 54 Sou. 172	81
Harrell v. *Prairie Oil & Gas Co.*, 8 Fed. (2d) 236	12, 82
Haskett v. *Maxey*, 33 N. E. 358	16, 53
Hathaway v. *Hoffman*, 153 Pac. 184	22, 47, 48
Havemeyer v. *Iowa Co.*, 3 Wall. 294	16
Holmes v. *Holmes*, 111 Pac. 229	22
Hurt v. *Hollingsworth*, 100 U. S. 100	2
Holton v. *Davis*, 108 Fed. 138	81
Insurance Co. v. *Dehott*, 16 Howard 415	16
Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349	15, 17, 19
Lankford v. *Platte Iron Works*, 235 U. S. 477	15, 18
Liberty Oil Co. v. *Condon National Bank*, 260 U. S. 255	5
Main v. *Lynch*, 54 Md. 658, 668	37
Maxwell Land Grant Case, 121 U. S. 381	78, 79
Meehan v. *Williams*, 48 Pa. St. 238	85
Meyer v. *Tupper*, 66 U. S. 582, 17 L. ed. 180	36
Moffet v. *Jones*, 169 Pac. 652	22
Oklahoma Constitution, Article 7, Secs. 11, 12 and 13	22
Oklahoma Revised Laws, 1910, Sections 3330, 6547 and 6569	23
Olcott v. *Supervisors*, 16 Wall. 678	16
Ozark Oil Co. v. *Berryhill*, 143 Pac. 173	14
Papoose Oil Co. v. *Swindler*, 221 Pac. 507	14
Parmenter v. *Ray*, 158 Pac. 1183	47, 48
Patterson v. *Winn, et al.*, 5 Pet. 233, 8 L. ed. 108	39
Probate Rules, 171 Pac. IX	14
Ray v. *McKnight*, 183 Pac. 489	81
Revised Laws of Oklahoma, 1921, Section 880	56
Revised Laws of Oklahoma, 1910, Section 5347	25

AUTHORITIES—Continued.

	PAGES
Saylor v. *Taylor*, 77 Fed. 476	38
Scott v. *Gypsy Oil Co.*, 239 Pac. 887	81
Scott v. *McGirth*, 139 Pac. 519	22
Session Laws of Oklahoma, 1919, page 288	54
Sockey v. *Winstock*, 144 Pac. 372	47
Spade v. *Morton*, 38 Okl. 384	47, 48
St. Louis & San Francisco Ry. Co. v. *McAllister*, 165 Pac. 1123	40
Stanly County v. *Coler*, 190 U. S. 437	15, 20
State v. *Gideon*, 119 Mo. 94	44
State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525	45
Suckley's Administrator v. *Ratchford*, 13 Grattan 60, 65 Am. Dec. 240	46
Taylor v. *City of Ypsilanti*, 105 U. S. 72	16
The Atlantic Delaine Co. v. *James*, 94 U. S. 207	78
The People v. *Nichols*, 79 N. Y. 583	35, 36
Town of Hardingsburg v. *Cravens*, 47 N. E. 153	16
Townsend v. *Little*, 109 U. S. 54	85, 86
Tucker v. *Leonard*, 183 Pac. 907	22
Twaddle v. *Winters*, 89 Pac. 289	35
United States v. *Bitter Root Development Co.*, 200 U. S. 451	3
United States v. *Breitling*, 20 How. 252	44
United States v. *Wilson*, 118 U. S. 86	2
Van Ingen v. *Berger*, 82 Ohio St. 255	42
Walda v. *Wilson*, 231 Fed. 654	4
Ward v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319	37
Watchorn v. *Rozana Petroleum Co.*, 5 Fed. (2d) 636	79
Weaver v. *Van DeVenter*, 19 S. W. 689	80
Welch v. *Focht*, 171 Pac. 730	22, 48
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Co.*, 137 Fed. 26	16
Wilson v. *Ware*, 6 Wall. 83	85

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1926.

No. 302

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

vs.

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* RESPONDENT.

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld.

The view taken by the Circuit Court of Appeals, briefly stated, is that the petitioners' cause of action is predicated upon the proposition that the leases under which respondent took possession of the lands were ended, and that it was a trespasser, the contract and stipulation extending the term of the leases being void and ineffective for that purpose; that the remedy at law which they had invoked

was adequate; that a federal court could not grant the relief of quieting title as prayed for because petitioners were not in possession and the respondent was in possession of the land; that the decree of the court was in effect a judgment at law, upon the issues involved, in favor of respondent, and that though brought to the appellate court by appeal, that court would treat it as if upon writ of error and would decide accordingly, but only upon the issues arising under the process, pleading and judgment, the trial being to the court without a jury, but without an express waiver thereof.

The authorities cited by the court seem ample to sustain its conclusions, and are not answered, we submit, by statements that the relief prayed for is equitable in its nature, and that a court of equity may dispose of the whole case and grant complete relief even if such relief be of the kind conferred by a court of law.

The petitioners' first cause of action was predicated on their ownership of land. They allege the execution of an oil and gas lease, which had expired at the time of the institution of the suit, and that the respondent was taking oil and gas from the land, and which is equivalent to an allegation that it was in possession.

—*Cosmos Exploration Co.* v. *Grey Eagle Oil Co.*, 112 Fed. 4

Petitioners were claiming the legal title on the ground that the attempted extension of the term of such leases was void. In such a case the remedy is at law.

—*Hart* v. *Hollingsworth*, 100 U. S. 100;
United States v. *Wilson*, 118 U. S. 86.

The so-called second cause of action merely reiterates the allegations of the first, no new facts being set up, but upon the same facts petitioners pray that their title be quieted.

The action of the petitioners, as disclosed by the pleadings, is really one of trespass for the wrongful removal and conversion of oil and gas from the land, as the recovery of a money judgment by way of damages is sought, and there being no question of respondent's financial responsibility, the remedy at law is adequate, and equity will not entertain the case notwithstanding averments of fraud in the petition.

—*United States* v. *Bitter Root Development Co.*, 200 U. S. 451

It is pointed out that the relief of cancellation of the contract extending the term of the leases was asked, and that the granting of this relief is not dependent on possession. It is apparent, however, this is merely a method of quieting title, for the suit is not predicated on rescission of the contract with the right to have same made effective, as a matter of record, by decree. Had the suit been of that character, petitioners would have been required to restore, or offer to restore, the consideration admittedly received under the contract. This, we understand, is the universal rule in equity, and is the requirement of the Oklahoma statute. (Sec. 5079, Laws 1921.) No such offer was made in the pleadings or proof, and attention is called to this omission for the purpose of emphasizing the view of the Circuit Court of Appeals that the suit was one to quiet title and not one predicated on rescission and cancellation. Furthermore, the petitioners asked for damages against a defendant presumably solvent, and were not entitled to the rem-

edy of cancellation without showing how they would sustain future injury by not having the contract of extension cancelled, or how the same, unless cancelled, would be a menace to the petitioners, or that there was danger that it would be used, tortiously or oppressively by the respondent to their injury; in other words, without showing how the remedy at law, which they had invoked, was not adequate. The judgment for damages would have been adequate, and moreover would have been conclusive of the rights of the parties, and could be pleaded as an adjudication against any claim of the respondent under the extended leases.

It is pointed out that respondent invoked equitable relief and is thereby concluded on the question under discussion. The answer of respondent called attention to the judicial proceedings resulting in the contract of extension of the term of the leases and its approval by the court as shown by the petition and its exhibits, and denied that the same were ineffective to extend the terms of the leases as charged in the petition. It admitted respondent's possession of the land, and that it was taking oil and gas therefrom, denied the charge of fraud, and set up that it was a bona fide purchaser of the extended leases, and asked that its title thereto be quieted. Are sections 274 A and 274 B of the Judicial Code applicable to that situation as claimed? Section 274 A relates only to the power of a court to order an amendment of the pleadings if the parties see fit so to do, in order that the same might be proceeded with on the proper side of the docket. *Waldo* v. *Wilson*, 231 Fed. 654. The fact that the cause here was proceeded with on the equity side and that the judgment was in the form of a decree is not conclusive, for the court found all the issues for the respondent, and its real judgment was that respondent was

the owner of oil and gas leases upon the lands involved (see decree). (*Ewert* v. *Robinson*, 289 Fed. 740.) Such a judgment would be equivalent to quieting respondent's title, and the mere fact that such relief was granted on its request did not operate to convert the action into a suit in equity.

Section 274-B merely permits equitable defenses in an action at law. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, is cited in support of the claim that the respondent's answer made the case an equitable one. There, however, the cause of action was at law for money had and received. Defendant admitted its liability for the money, but averred that it held the same as a stake-holder, and that others, besides the plaintiff, were claiming it, and therefore offered to pay it into court and prayed that the other claimants be made parties so that the question of ownership might be litigated as between them. The answer of the defendant set up an entirely different set of facts, which changed the issues so that the proceeding thereby became an equitable one, an interpleader under section 274-B. Surely that could not have been the result of respondent's answer in the instant case unless it had admitted the allegations of the petition and that the sole issue in the trial had been upon its plea of bona fide purchase. We take it that the equitable defenses referred to in section 274-B relate to equitable *remedies*, such as reformation, cancellation, etc., which were always available to a defendant against whom there exists an admitted legal liability. The word defense is the significant word signifying something which simply defeats recovery in an action or suit and not something by means of which the defendant can have independent relief. Pomeroy's Code Remedies, paragraph 27.

The conclusion of the Circuit Court of Appeals that the primary relief was at law and furnished an adequate remedy—the equitable relief demanded being incidental only, *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25—and that it was immaterial that the real judgment was, by common consent, in the form of a decree, appears to be sound in principle. It is not a question of waiver or failure to object to the procedure; it is a question of whether the petitioners have the right to insist that the primary and principal relief demanded by them was equitable and that they were entitled to such relief upon the face of their petition. The construction of that petition by the Circuit Court of Appeals puts the petitioners in the attitude of asking the trial court to adjudge and determine whether the respondent was a trespasser and was wrongfully removing oil from their lands, and if so, to award them damages for such wrongful conversion, and, as an incident to such recovery, declare by a decree the invalidity of the lease extensions. The petitioners are insisting, however, that the allegations of fraud and non-compliance with Rule 9 made the main cause one for equitable relief, with damages as an incident. The authorities would appear to sustain the view of the Circuit Court.

On the merits the two propositions advanced by petitioners are:

> *First.* That the extension of the term of the leases on June 16, 1916, was not made in accordance with the provisions of Rule 9 of the probate rules promulgated by the justices of the Supreme Court of Oklahoma, and that therefore the probate court in approving such extensions acted without jurisdiction.
>
> *Second.* That the extension was obtained by fraud

and unfair dealings and for a grossly inadequate consideration.

Under the first proposition there is presented a question of public interest, *viz:* whether the highest court of a state, or the judges composing that court, may, under statutory authority to make general rules to carry out the provisions of the state code, prescribe a rule regulating the procedure of inferior courts of general jurisdiction so as to nullify their judgments in respect to matters within such jurisdiction because of non-compliance with a rule so prescribed, and whether this court is bound by the decision of the state Supreme Court that the judgment of such inferior court rendered without an observance of the rule is void for want of jurisdiction and retroactive in its effect.

On the merits of the case as a whole it is the position of the respondent:

1. **The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved.**

2. **(a)** ***Carlile*** **v.** ***National Oil & Development Company*** **and** ***Winona Oil Company*** **v.** ***Barnes,*** **decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules.**

(b) The order and judgment of the probate court approving the transactions involved, made in the exercise of

a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved.

3. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of procedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived.

4. (a) The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contracts.

(b) The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding.

5. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud.

I.

Before discussing the questions of law involved in the petitioner's first proposition we desire to call the court's attention to the proceedings in the probate court resulting in the order and judgment herein assailed, and from which, we think, the conclusion may fairly be drawn that the re-

quirements of the rule referred to were observed so far as they could apply to a transaction not within the express terms of the rule itself. That rule provides that no oil and gas lease covering the lands of infants under guardianship will be approved "except after sale in open court to the highest and best responsible bidder," and that "notice of such sale must be given by posting and by publication, where publication is practicable."

The record shows that notice was given; that Mrs. Weldy, as guardian of her minor children, and as administratrix of the estate of William G. Twist, deceased, gave notice that she would "sell at public sale to the highest bidder, subject to confirmation of said court, on Friday, the 16th day of June, 1916, at 10:30 o'clock A. M., in the County Court room in the City of Tulsa, Oklahoma, an extension of oil and gas mining lease now covering the following described tracts of land in Tulsa County, State of Oklahoma, to-wit:" (Describing the tracts of land covered by the four leases.) (R. 26.) This notice was posted on June 5, 1916, in three public places in Tulsa County (R. 28), which was in compliance with the order of the County Court (R. 12). On June 16, 1916, the guardian and administratrix made a sworn report that she had executed to the Los Angeles-Cherokee Oil Company an extension of the terms of the four leases "for a period from the date of the expiration of each of said present leases for so long as oil and gas should be produced" and for a total cash bonus of $18,080.00, and increase in the amount of royalty from ten per cent to twelve and one-half per cent of the oil produced and saved from the premises (R. 13-14). On the same day the court made an order reciting that it had heard the petition, witnesses, and statement of counsel, and reciting the

consideration for the extension to be "the sum of $18,000.00 in cash, and an increase of the royalty on each lease from ten (10%) per cent to twelve and one-half (12½%) per cent, effective forthwith, and the drilling of a well on each of said tracts within six months from this date," and finding "that said proposition is beneficial and for the best interests of said minors and that the same should be approved." The approval is in the following language:

> "It is further considered, ordered and adjudged that the court having examined said agreements extending the terms of said leases, does hereby approve and confirm the same, and does approve and confirm the extension of said leases for a term so long as oil or gas shall be found thereon." (R. 15-16.)

There is nothing to indicate, and Mrs. Weldy offered no evidence, that anyone had made a better offer than the Los Angeles-Cherokee Oil Company had made her. It was therefore the highest and best bidder in the absence of any proof that other persons offered or made a better or higher bid.

Counsel for petitioners have not pointed out wherein the proceedings failed to comply with the requirements of Rule 9, except to urge certain "irregularities," which, in effect, are that the proceedings related merely to the approval of an agreement which the guardian had made with the Los Angeles-Cherokee Oil Company—the lessee under the existing leases—and not to a sale of an extension of the terms of such leases. If Rule 9 applied to the situation at all, the court must be impressed with the difficulty of applying it to the case of a proposed extension of the term of an existing lease. This difficulty was recognized by the Supreme Court of Oklahoma in the two cases cited by petitioners in

support of their contention that the extension of the terms of these leases was void (*Winona Oil Co.* v. *Barnes; Carlile* v. *National Oil & Development Co.*). In the *Carlile* case it was said:

> "The defendant in error suggests in their brief that it would be a vain and useless thing for the court to put up at public auction, during the term of a lease, the question of the extension and modification of the old lease, for the reason that no one would bid on such an interest but the old lessee, due to the interest of the old lessee still subsisting."

And in reply to that contention the court said:

> "The trouble with such a contention is that it involves a suggestion of a reason why a court, in the exercise of its discretion, and with due regard to the interests of the ward, should not make an order allowing a sale or an extension under such conditions, but if, in any case, the County Court, in his discretion, concluded it was the best interests of the minor that it be done, there is no reason why there could not be at least *a reasonable compliance with the procedure laid down in Rule No. 9. It might result in a vain thing and result in the same thing as has resulted in the instant case. But it would result in a sale, judicial in its nature, and the rights of the minor would at least be protected by an opportunity for open and public bidding, and the purposes of the law satisfied.*"

The extension of the lease in that case was made without notice of any kind, and it was admitted that the result might have been no different even if public notice *had* been given, but that in such event the rule would have been obeyed and the court would then have been powerless to strike down the result of obedience to its own mandate or

the mandate of the judges composing the court, who, as such, promulgated the rule.

In *Harrell* v. *Prairie Oil & Gas Co.*, 8 Fed. (2d) 236, the question of the extension of an existing lease at a time when Rule 9 was in force, was involved. The requirements of the rule as to publication, etc., were complied with, and the lessee was the purchaser at the sale. It was contended that the probate proceedings were ineffective to extend the lease because, among other things, they

> "failed to state, either in the petition of the guardian to sell the new lease, or in the order authorizing its sale, or in the notice of sale, whether the proposed lease would take effect immediately upon its approval by the court or at the end of the term of the then existing lease; that the purpose of the sale and lease would be a cloud upon the title of any bidder other than appellee, and the lease to anyone else would not become effective until the expiration of the old lease, thus preventing competitive bidding; that the proceedings were fraudulent in that the notice of the proposed giving of the new lease did not state that the lands then had producing wells thereon."

The argument, however, did not prevail. The court said:

> "There is no statute of the state regulating the procedure in the sale of an oil lease on a ward's lands, but in 1914 the Supreme Court adopted a rule governing the procedure which has been adjudged controlling (*Carlile* v. *National Oil & Development Company*, 83 Okl. 217, 201 Pac. 377), wherein it is provided that such leases must be sold in open court to the highest and best responsible bidder, that petitions for the approval of such leases shall be filed at least five days before the same are to be sold, and that notice of such sale must be given by posting and publication where publi-

cation is practicable. All of these requirements were complied with."

The proceeding in the instant case was an honest and painstaking effort on the part of the probate court to comply with the rule and also to accommodate the notice to the actual facts and circumstances. To have given notice of a sale of a lease would have been misleading. Prospective bidders would not know from such notice that the leases advertised were existing leases, completely equipped and producing oil. Furthermore, a bidder would have to contemplate the dismantling of the leases of their equipment by the Los Angeles-Cherokee Oil Company at the end of the prescribed term, for, of course, it was not obligated to sell that equipment. Prospective bidders were therefore informed by the notice that it was the extension of existing leases which was to be sold. The court wanted to be advised, of course, as to the expediency of extending the term or permitting the leases to expire with all the consequences which might result from dismantling them of their operating equipment at that time, and consequently gave notice that it would hear any objection as to why the leases should not be extended. To urge that a private arrangement or contract between the lessee and the guardian and administratrix had already been made, is beside the point. That agreement had no validity unless the court approved it. If anyone had appeared pursuant to the notice and had offered a better arrangement than the proposition of an extension of the existing leases, or had made a better offer for such extension, all of which was the object of giving the notice, and of which there would have been no necessity except for the rule, the court, we must assume, and in accordance with its duty to protect the interests of the

ward, would have adopted it. It has never been the opinion of the writer that the rule applied to the extension of the term of an existing lease, a matter involving merely the modification of the original lease, which is not a sale, but a contract for the use, of property. (*Papoose Oil Co.* v. *Swindler*, 221 Pac. 507.) In the very nature of things the proceedings to obtain the extension could only be a compromise between the actuality and the rule required to be observed. The question of modifying the original contracts was addressed to the discretion of the probate court which has jurisdiction over a minor ward and his estate until he arrives at majority.

—*Ozark Oil Co.* v. *Berryhill*, 143 Pac. 173.

That view has support in *Ardizzone* v. *Archer*, 160 Pac. 446, which, by clear inference, holds that the modification of an oil and gas lease, with the consent of the probate court, is binding. There was in the instant case a formal compliance with the rule as to notice. The fact that there was no "publication" of the notice in addition to its being posted in three public places, is immaterial. Rule 18 of the same rules provides:

> "All advertisements not required by law may be waived with the consent of the County Court upon the approval of the probate attorney or tribal attorney."
>
> —171 Pac., page IX.

The objection that there was no "sale" of the extensions because the probate court did not in terms authorize or direct the sale, is not well taken. The notice given under the rule was specific, namely, that the guardian would "sell at public sale to the highest bidder * * * an extension of an oil and gas mining lease," and the subsequent approval

by the court of the execution of the extended leases to the lessee for the consideration offered by it can amount to nothing else but a sale within the meaning of the rule. We think there can be no doubt, therefore, that the provisions of Rule 9 were complied with, and if so, further discussion of the petitioner's first proposition would seem to be unnecessary.

II.

But even if it were true that the rule had not been complied with and the proceedings did not amount to a sale subject to competitive bidding as held in the *Winona* and *Carlile* cases, it is our contention *(a)* that as there was no decision on this point at the time the rights claimed herein arose, the subsequent decisions of the State Supreme Court were not controlling, and that this court has the right to exercise its independent judgment on the question; and *(b)* that the order and judgment of the County Court made in the exercise of a jurisdiction recognized by the State Supreme Court in its prior decisions was valid, and that under the rule of such decisions a right of property vested in the Prairie Oil & Gas Company by its contract of purchase of such extended leases. In support of these contentions we rely upon:

Kuhn v. *Fairmont Coal Company*, 215 U. S. 349;
Burgess v. *Schuman*, 107 U. S. 20;
Lankford v. *Platte Iron Works*, 235 U. S. 477;
Stanly County v. *Coler*, 190 U. S. 437;
East Alabama Railway Company v. *Doe*, 114 U. S. 340;
Gibson v. *Lyon*, 115 U. S. 439;

Anderson v. *Santa Anna*, 116 U. S. 356;
B. & O. R. R. v. *Baugh*, 149 U. S. 368;
Folsom v. *Ninety-six*, 159 U. S. 611;
Douglass v. *County of Pike*, 101 U. S. 677;
Anderson v. *Santa Anna T. P.*, 161 U. S. 361;
Insurance Co. v. *Debolt*, 16 Howard 415;
Gelpcke v. *City of Dubuque*, 1 Wall. 175;
Havemeyer v. *Iowa Co.*, 3 Wall. 294;
Olcott v. *Supervisors*, 16 Wall. 678;
Taylor v. *City of Ypsilanti*, 105 U. S. 72;
Haskett v. *Maxey*, 33 N. E. 358;
Town of Hardingsburg v. *Cravens*, 47 N. E. 153;
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Company*, 137 Fed. 26.

In the case first cited, the plaintiff, Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia. The deed contained a clause granting unto Camden a . the coal and mining privileges necessary and convenient to the removal of the coal, together with the right to enter upon and under said land, and to mine, excavate and remove the coal, etc. Suit was commenced by Kuhn to recover from the coal company damages arising from the failure of the coal company to maintain proper supports so that the overlying surface was caused to fall. It appears that after this deed was executed to Camden, one Griffin brought an action in a court of West Virginia similar in all respects to this one against the Fairmont Coal Company, which was the successor of Camden. Griffin's rights arose from a deed almost identical with that executed by Kuhn to Camden. The *Griffin* case was decided in favor of the coal company and

the case was appealed to the Supreme Court and an opinion rendered (see 59 W. Va. 480) sustaining the lower court. In the *Kahn* case it was urged that the decision upon this question by the Supreme Court of West Virginia was binding upon the federal court sitting in West Virginia. The case reached the Circuit Court of Appeals which certified this question as to the binding effect of the *Griffin* case to the Supreme Court of the United States where the answer was that the decision was not binding upon the Federal Court, and in passing upon the question the court, in an opinion by Justice HARLAN (HOLMES, WHITE and MCKENNA dissenting), announced a rule covering the whole subject of the effect of decisions of the state court in the Federal Court, and we quote from the opinion the following:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules: *1.* When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal Court is an independent one, not subordinate to but co ordinate and concurrent with the jurisdiction of the state courts. *2.* Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal Court as authoritative declarations of the law of the state. *3. But, where the law of the state has not been thus settled*, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence. *4.* So, when contracts and transactions are entered into and rights have accrued under a particular state of

> the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal Court should always lean to an agreement with the state court if the question is balanced with doubt."

In *Lankford* v. *Platte Iron Works*, 235 U. S. 461, which was originally commenced in the Federal Court for the Western District of Oklahoma the question involved was whether a suit against the State Banking Board of the State of Oklahoma was a suit against the state. The principal opinion held that it was, and in reaching the conclusion, prefaced a reference to several decisions of the Supreme Court of Oklahoma with the following statement:

> "Certainly this construction can be given to the Oklahoma statute; and granting that it may admit of dispute an important element to be considered is the decision of the state tribunals."

but nowhere in the principal opinion is there any statement to the effect that the decisions of the state tribunal are binding upon the Federal Court.

A dissenting opinion by Mr. Justice PITNEY, concurred in by Justices DAY, VAN DEVANTER and LAMAR, held that it was not a suit against the state, and we quote the following from the dissenting opinion:

> "We are referred to certain cases in the state court of last resort, one of which, and a very recent

one, bears directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties —a ground of jurisdiction especially provided for in the Constitution (Article III, section 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose*. For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess* v. *Seligman*, 107 U. S. 33, 34; *East Alabama Ry.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 357, 360."

The foregoing dissenting opinion applies the rule announced in the case of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, to the construction of a statute and the following cases referred to in the dissenting opinion of Mr. Justice PITNEY also involve the construction of statutes and apply the same rule as that announced in *Kuhn* v. *Fairmont Coal Company, supra*.

Burgess v. *Seligman*, 107 U. S. 20, involved the construction of a statute of the State of Missouri.

Stanly County v. *Coler*, 190 U. S. 437-443, involved the construction of the Statutes and Constitution of North Carolina.

The first syllabus in *Anderson* v. *Santa Anna*, 116 U. S. 356, reads as follows:

> "When at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a state the highest court of the state has construed the law under which it purports to be issued rights accruing under that construction will not be affected merely by the subsequent decisions of the same courts varying or departing from it."

At page 362 of this opinion the court discusses the rule where there was no decision construing the statute at the time the rights accrued and uses the following language:

> "If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Schofield* v. *Watkins* and *Keithsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the state court in reference to the power of the legislature to enact the Statute of February 28, 1887. In that case the duty of this court is to determine what was the law of Illinois when the rights of the parties accrued."

In *Folsom* v. *Ninety-six*, Folsom brought suit against township ninety-six in the County of Abbeville to recover on bonds of the township issued on March 25, 1886, to aid in building a railroad. In 1888 the Supreme Court of South Carolina held in *Floyd* v. *Perrin*, 30 S. C. 1, and *Whitesides* v. *Neely*, 30 S. C. 31, that the act under which these bonds were issued was unconstitutional and void. It was urged that this decision was binding upon the federal court in the

determination of the case of *Folsom* v. *Ninety-six* but the Supreme Court of the United States held to the contrary and after quoting at considerable length from the case of *Burgess* v. *Seligman*, 107 U. S. 20, uses the following language at page 626:

> "In the case at bar, the Statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligation of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the profession, and by the legislative, executive and judicial departments of the state. And the decisions of the Supreme Court of the state, during the same period, appear to have assumed the validity of such bonds. *Chamblee* v. *Tribble*, and *Carolina Railway* v. *Tribble*, above cited."

And again at page 27:

> "There not being shown to have been a single decision of the state court against the constitutionality of the Act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its views of the law of South Carolina."

We therefore maintain that this court has the right to determine for itself the effect of a violation of Rule 9.

III.

It has long since been settled that under the Constitution and Statutes of the state, County Courts are courts of general jurisdiction with respect to infants and their property.

—*Eaves* v. *Mullen*, 107 Pac. 433;
Scott v. *McGirth*, 139 Pac. 519;
Welch v. *Focht*, 171 Pac. 730;
Holmes v. *Holmes*, 111 Pac. 229;
Baker v. *Carrton*, 150 Pac. 1060;
Hathaway v. *Hoffman*, 153 Pac. 184;
Moffet v. *Jones*, 169 Pac. 652;
Tucker v. *Leonard*, 183 Pac. 907.

Section 11, article 7 of the Constitution provides:

"There is hereby established in each county in the state a County Court which shall be a court of record."

Section 12, article 7, provides:

"The County Court, coextensive with the county, shall have original jurisdiction in all probate matters."

Section 13, article 7, provides:

"The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

The relevant statutory provisions on this subject are found in sections 3330, 6547 and 6569, Revised Laws of 1910. Section 3330 is a part of the chapter on guardian and ward, and provides:

> "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

The other two sections are a portion of the chapter on probate procedure. Section 6547 provides:

> "Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas in consideration of a royalty of part or portion of the production thereof and under the same procedure in the County Court as now provided by law where such consideration is money."

Section 6569 provides:

> "The County Court on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders, and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The power and authority conferred on guardians and County Courts by the constitutional and statutory provisions of the probate system in Oklahoma, is as great and comprehensive as that found under the constitution or laws

of any state with which we are acquainted. Here, in express language, is conferred on the guardian and the County Court the power to make oil and gas mining leases *without limitation or the hint of limitation as to the term of the leases*, without limitation or restriction or the hint of limitation or restriction on the power conferred, without regulation of the manner of the exercise of the power conferred save the leasing is to be "*under the same procedure as now provided by law.*" Under this system of laws the County Court is the successor to or inheritor of all probate authority exercised at common law by any court except where such power is limited by constitutional and statutory provisions. Where the legislature intended such power to be limited they have limited it, as for instance, by providing that the County Courts may not order or control the marriage of its wards. This jurisdiction *is in its nature exclusive because it is general in character* and the constitutional provisions do not confer on any other court *any jurisdiction* concerning probate matters except on appeal. It, therefore, of necessity, follows that the County Court is the only court in Oklahoma possessing *original probate jurisdiction*, and that as a consequence of the foregoing constitutional and statutory provisions it possesses all *the power theretofore possessed by chancery courts in the control, management and disposition of the property of its wards and possesses such jurisdiction to a greater extent than possessed by chancery courts.*

In *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, the Supreme Court of Oklahoma, after reviewing the constitutional provisions, says:

"By sections 1, 2 and 3 of article 7 of the constitu-

tion, jurisdiction of all probate matters is conferred upon the County Court."

It was further held in that case that the sections of the statutes above quoted control the proceedings of County Courts in the sale of an oil and gas mining lease. The legislature has never changed or amended these statutes. It is insisted however that Rule 9 abrogates these provisions, and that the effect of the rule is to render void, for want of jurisdiction, any order or judgment of a court which is the result of proceedings not conducted in strict compliance with the rule. We submit that the rules cannot have that effect, and that the conclusion of the Supreme Court in the cases mentioned is absolutely untenable, for the following reasons:

First. All the authorities hold that a rule of court *cannot take away from, add to, or change the statute*, and therefore Rule 9 could not take away the constitutional and statutory power of the County Court to make the orders assailed in these cases.

Second. Section 5347, Revised Laws of Oklahoma, gives the Supreme Court the power to revise its general rules and make such amendments thereto as may be required to *carry into effect the provisions of the code*. One of the provisions of the code to which effect must be given, as construed in *Duff* v. *Keaton*, is that the probate court has the right to *order a private sale of a lease*. Any rule must therefore *give effect to such a provision*, but the decision of the court in the *Winona* and *Carlile* cases is that the rule *takes it away*. Section 5347 further provides that the court "shall make further rules consistent therewith as they may deem proper." A rule *taking away the very power given by the code, viz.*, the power to make a private sale,

is certainly *inconsistent* therewith and in violation of the statute.

Third. The defendant, The Prairie Oil & Gas Company, could not have anticipated such a construction of Rule 9 because statutes controlling probate procedure, just as mandatory in language and form as the provisions of that rule have been construed, in a long line of decisions by the state Supreme Court, before its rights accrued, as directory only and not affecting the jurisdiction of the County Court.

Conceding the entire correctness of the doctrine that rules of court lawfully promulgated and properly put into effect have the binding force and effect of law, yet if Rule 9 is to be considered in any other light than as being directory merely it must fail and be rejected as of no force and effect because:

(a) It deprives the County Court of the discretionary power conferred by section 6569 of the statutes; *(b)* because it interferes with the exclusive jurisdiction and control of the guardian in the management and disposition of the property of his ward conferred by section 3330 of the statutes; and *(c)* because it is an attempt to limit and control the jurisdiction conferred on County Courts in probate matters by the constitution, and expressly as to the jurisdiction conferred by sections 3330, 6569 and 6547 of the statutes.

It is at once evident that if without Rule 9 County Courts had jurisdiction to approve or direct the making of oil and gas mining leases by guardians on the lands of their wards, without advertisement and without public sale, and such rule is to be construed as to deprive such courts of

such power, *it is a limitation upon the jurisdiction of such courts*, and deprives such courts of the power to be governed and controlled alone by what, in their judgment, is the best interest of the estate of the minor.

This is so because the question is not presented on appeal or on direct attack, but insofar as the particular question under consideration is concerned, each of the cases under review constitutes a collateral attack on the judgments of the County Court, and the question now presented to the court is not whether the County Courts wisely exercised the discretion conferred by law on them; it is not a question of whether the record discloses that the action of the different County Courts was for the best interest of the minor, but the attack is frankly predicated on the assumption that the County Courts had no jurisdiction because of the alleged departure from Rule 9, and that therefore the orders made are void and subject to both direct and collateral attack.

If Rule 9 is to be given the force ascribed to it by the lessors, this court must of necessity hold such rule to be void and of no effect, whereas, if it is held to be directory or advisory, there is and can be no question of its validity, and when two constructions are capable of being placed on the rule, one of which gives it force and effect, and the other deprives it of force and effect, the construction which will give force and effect to the rule is that to be adopted and declared as the true construction.

In order to demonstrate the correctness of these statements it is only necessary to consider a few sections of the state statutes.

Section 1458 (Laws of 1921) provides:

"Guardians of infants and insane persons are

hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court as now provided by law, where such consideration is money."

It appears from the most casual examination of the terms of the above section that guardians are vested with power *(a)* to make a mineral oil and gas lease for a royalty instead of for cash; *(b)* to make a grant of mineral oil or gas in consideration of a royalty instead of for cash; *(c)* that such lease or grant must be approved by the County Court, and in such approval the same procedure must be followed as that provided by law where the consideration of such lease or grant is money; *(d)* that the act presupposes that the power exists in the guardian, with the approval of the County Court, to make oil and gas mining leases and grants for a cash consideration, and also presupposes that a procedure governing such a lease or grant for cash exists.

Assuming this analysis of the statute to be correct, and that it is so scarcely admits of a doubt, it is necessary to discover the statute under which the authority of the guardian to make oil and gas mining leases for cash, and providing the procedure therefor, is given. This statute is found in section 1482 of the Laws of 1921, which is as follows:

"The County Court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders and give such directions as are needful for the

management, investment and disposition of the estate and effects, as circumstances require."

To appreciate the full force and effect of this last section, it is necessary to consider the same together with section 6583 of the statutes, which is as follows:

> "In all cases the court making the appointment of a guardian *has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.*" (Italics ours.)

These two sections taken together, and in connection with the other statutory and constitutional provisions quoted in this brief, conclusively establish that the County Court is the only court that is given jurisdiction to control the guardian in the disposition and management of the estate of his ward, and that such jurisdiction is exclusive. This means it is free from the dictation, supervision or control of any other superior directing force, and that *to undertake to control, and direct the County Courts, and to say to them that they shall proceed only in a certain manner and by a particular designated method, and to say that unless such power is exercised in the manner and method so prescribed the County Court has not jurisdiction, is to, in reality, control the guardian in the management and disposition of the ward's estate, for when we control the power behind the throne we, in fact, control the throne.* When we say that the acts of the guardian shall be of no binding force and effect unless such acts conform to and receive the sanction of a rule prescribed by any other body than the County Court, we, in truth and in fact, as well as in effect, *control the guardian in the management and disposition of his ward's estate.* When, in addition to the pro-

visions of law, a court lays down a rule, *and says there exists no right of action except in conformity to and in compliance with such rule, it limits, it controls the jurisdiction existing before the announciation of the rule.*

If the rule so announced deprives the court of *any discretion*, and compels action only in a *particular channel*, regardless of whether the court acting thinks such action is best for the interest of the minor or not, it deprives it of the *discretionary powers vested in it by the constitution and the statutes*, and deprives it of the power to control the guardian in the management and disposition of his ward's estate as to what the court considers to be the best interest of the ward, *and substitutes the discretion of the County Court by the discretion of another court.*

The reason that County Courts and the chancery courts in exercising probate jurisdiction have been invested with discretionary powers in the management and control of the estates of their wards is that human experience has demonstrated the folly of trying to provide for the unknown contingencies that arise in the management and control of such estates by inflexible rule. Such experience has demonstrated the need of *flexibility and the injurious effects of its want.*

It is apparent from the most casual inspection of the above sections of the statute that they prescribe the procedure to be followed in the leasing of minors' lands. The words "as now provided by law," in section 6547, mean something, and must mean that such section proclaims and ordains *the then existing procedure as the procedure necessary to be followed.* The procedure is that found in section 6563 of the statute, that is, that on application to the Coun-

ty Court to lease lands of his ward by a guardian, the County Court has power to make such orders and give such directions as are needful for the management and disposition of the estate and effects of its ward as circumstances may require, and to approve or disapprove the making of such leases as in its discretion the interests of the minor require, and there is nothing in either section of the statute that requires the *application to lease to precede the actual leasing*. There is nothing that indicates a legislative intention to secure the prior authorization of the court to the making of a lease before its execution by the guardian. The only thing necessary to obtain is the approval of the County Court to the lease or grant, and it matters not whether the approval is made prior or after the leasing. In fact, the more orderly method of procedure would be to secure the approval after the leasing. This being the procedure provided by law, no court can make a rule *changing or modifying such procedure unless by constitutional or statutory enactment it is expressly given the power to modify or change the rules established by legislative enactment*. This we believe to be too clear to need further argument or lucidation. In fact, it seems that the above propositions are so clear that argument but serves to conceal and not to explain, and therefore we will proceed to the citation of a few out of the multitude of cases sustaining the above propositions.

In *Duff v. Keaton, et al.*, 33 Okl. 93, 124 Pac. 291, the Supreme Court of Oklahoma, by Justice WILLIAMS, implicitly holds that section 1482 is the section under which the County Courts have power to approve oil and gas mining leases of guardians and furnishes the procedure named in section 6547. In such case the court says:

"But it is insisted that these conclusions are contrary to section 5530, Compiled Laws of 1910 (6547, Laws of 1910), which authorizes the guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by section 5513, *supra* (6569, Laws, 1910), and that by said section said leases in order to be valid must be *first approved by the probate court;* it being specifically provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. Having also reached the conclusion that such a lease was personalty and not realty, *it is under the procedure by virtue of said section 5513 that oil and gas leases were authorized to be approved by the probate courts, and section 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.*" (Italics ours.)

In *Cabin Valley Mining Company* v. *Hall*, 53 Okl. 760, 155 Pac. 570, this court explicitly holds that section 1482 furnishes the procedure referred to in section 6547, the court saying:

"The procedure referred to is that prescribed by section 6569, *supra*, which requires the guardian to make application to the County Court, after notice in accordance with the directions of the judge, where-

upon the court is authorized to make such orders and give such directions as are needful and as the circumstances may require. *Duff, et al.*, v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (n. s.) 472. There is no limit in this section as to the terms of the lease, nor any limitation as to the time for which same may run; it being left to the judgment of the court *in the exercise of a sound discretion, TO DETERMINE what is best for the interest of the minor under the circumstances.*" (Italics ours.)

So there is no limitation put upon the authority of the County Court to approve leases except that found in section 1482 of the statutes, and it is left to the sound *discretion of the court*, that is *of the County Court*, to determine whether such lease shall be made, after advertising for bids therefor at public outcry, *or by disposing of the same to a particular named person for a fixed price*. Either of these methods might at different times and under varying circumstances be for the best interest of the minor, and the court without limitation, is given authority by the statute to adopt either of these courses, or any other course, which, in its judgment, will be for the best interest of the minor under the then existing circumstances.

If Rule 9 limits the discretion so reposed in the court, it must, under all the authorities, be held bad, and the only way to uphold and sustain it is to regard it as only directory and advisory, and consequently jurisdiction of the court does not depend upon compliance with its provisions. In *De Lorme, Administrator*, v. *Pease*, 19 Ga. 220, the court, by Justice LUMPKIN, says:

> "It is not denied but that this rule of the Supreme Courts restricts the *discretion* of the courts as to the

permission to recall a witness, which was unlimited at common law. *Have the judges this power? Clearly not.* Their power extends to and was intended to embrace all ground *uncovered by the statute or common law.*" (Italics ours.)

In *Adams Express Company* v. *Trego*, 35 Md. 47, the court says:

"If the court below was not satisfied that the ends of justice required a continuance, it was clearly right in refusing to grant it; *and no mere rule of court could be allowed to operate to divest such discretion, or in any manner to change or modify the statutory provision on the subject. Rules of court must not be in conflict or inconsistent with the statute law of the state.*" (Italics ours.)

In *Gormerly* v. *McGlynn*, 84 N. Y. 284, it is said:

"The provision of the Code of Civil Procedure (Sec. 17) authorizing a convention of the general term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to *alter, modify or annul any rule of practice established by the code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code.*"

In *Gates, et al.*, v. *Mack*, 6 Col. 401, it is said:

"The next point made in behalf of the defendants in error is, that the appeal was properly dismissed for the default of the plaintiffs in error to comply with a standing rule of the District Court. This rule is set out in the transcript, and provides, substantially, that in any case appealed from the County Court to said District Court, if the appellant shall fail for a period of fifteen days to file in the District Court a transcript

of the proceedings, together with all necessary papers relating thereto, the appellee, upon filing a transcript of the judgment and a copy of the appeal bond, shall be entitled to have the appeal dismissed at the cost of the appellant. Counsel argues that it cannot be fairly inferred that the legislature ever intended to require written notice of a motion to dismiss in a case of this sort, where there is a standing and general rule of court, of which counsel are bound to take notice, providing for a dismissal; that such a rule is a standing notice of such motion, and that this rule is analogous to Rule 26 of this court, under which appeals are dismissed in like manner. *To these propositions we answer that a rule of court cannot supersede a statute.*"

In *Federal Cement Tire Company* v. *Korff*, 50 Ind. Appeals 608, 97 N. E. 185, the court says:

"The rule of court cannot abrogate or prevent the exercise of a statutory right."

In *Twaddle* v. *Winters*, 85 Pac. 289, the Supreme Court of Nevada says:

"Where there is a conflict between a statute and a Supreme Court rule, the former will control."

In *The People* v. *Nichols*, 79 N. Y. 583, the Supreme Court of New York, speaking of a rule which attempted to prevent judges from exercising certain jurisdiction except at stated times, and to designate terms of court at which only certain kinds of business could be transacted, said:

"It is provided by the constitution that the court itself shall have general jurisdiction in law and equity. It follows that this jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself. (*Hart* v. *Hatch*, 3 Hun. 375.) Its

functions are to be exercised by its judges sitting in general terms, or at the circuit or oyer and terminer or special terms. The constitution also provides that each judge may hold special terms in any county (Art. 6, Sec. 7), and neither in that instrument nor in any statute do we find that one special term, or one judge at special term has, or can have, more authority or power than another. The Code (Sec. 233) authorizes the justices of the Supreme Court for each judicial district to appoint the times and places for holding the special terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as 'Special Terms for Equity Cases and Enumerated Motions,' and others as 'Special Terms for Non-enumerated Motions and Chamber Business,' and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the direction of the judges, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. *If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy and the rights of citizens infringed.* The case before us illustrates this position." (Italics ours.)

Again on page 592 the court says:

"It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore be of eight days. *But the rule is binding only as it is consistent with the Code.*" (Italics ours.)

In *Meyer v. Tupper*, 66 U. S. 582, 17 L. ed. 180, the court says:

"After the passage of the Judiciary Act of 1789, Congress, at the same session, passed the act prescrib-

ing the process to be used in the different courts it had just established (1 Stat. 93); and by the act directed that, in the courts of admiralty and maritime jurisdiction, *the forms and modes of proceeding should be according to the course of civil law.*

"This act left no discretionary power in the admiralty courts, or in the Supreme Court, *in relation to the modes and form of proceeding.*" (Italics ours.)

In *Ward* v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319, the court explaining the holding in *Beers* v. *Houghton*, 9 Pet. 360, says:

"Explained as above, the remarks are perhaps without objection, *but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish or vary the operation and effect* of mesne or final process upon the property of the debtor in respect to the matter under consideration." (Italics ours.)

In *Main* v. *Lynch*, 54 Md. 658, 668, the court says:

"This motion was opposed by the defendants because of the twenty-eighth rule of that court which is as follows: 'When a plaintiff or defendant has closed his case on the testimony, and a prayer shall be offered to the court upon such testimony, he shall not offer any additional evidence on the subject to which the prayer refers or with regard to the case in any particular'; but the court permitted the amendment and received the proof offered. It is the ruling of the court on this motion which forms the ground of the first exception. 'This court has always regarded a *legitimate* rule of the court as prescribing a law to the court.' *Dunbar* v. *Conway*, 11 G. & J. 97; and in *Wall* v. *Wall*, 2 H. & G. 82, and *Gist* v. *Drakley*, 2 Gill. 346, this court has said there exists no discretion in an inferior court

to dispense with its own rules, or innovate on the established practice. The rules of court which are, by the decisions referred to, given the force of law, until wholly rescinded, are such rules as a court has the power to pass; *for a court cannot pass a rule which takes away from a party litigant a right positively secured by law.*" (Italics ours.)

In *Saylor* v. *Taylor*, 77 Fed. 476, the Circuit Court of Appeals of the Fourth Circuit had before it for consideration the effect of the following rule:

"Among admiralty claims of otherwise equal dignity, the one first libeling shall be first paid, but petitioners shall be paid pro rata."

Under this rule, one of the parties in the trial court had been decreed precedence over other plaintiffs. In passing upon the effect of this rule, the court says:

"Upon reason, upon principle, and upon authority, all of the same class and of equal merit should share equally; and the only question remaining is whether these rights can be displaced by Rule 4 of the District Court, above cited. We are of the opinion that this rule cannot have that effect. The right to make rules is given in section 918 of the Revised Statutes in the words following (citing statute).

"By virtue of this section the courts may make rules of practice, *but they cannot create rules of law.* They cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the Statutes of the United States, or under the general maritime law, which these courts are created to administer, *are rules of property, and it is beyond the potency of judicial power to alter them, or take them away by rules of practice.*" (Italics ours.)

In *Hamilton, et ux.*, v. *Fowler, et al.*, 83 Fed. 321, the court says:

> "These rules of practice and procedure, if regulated by the statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time, and, when the statute says that 'the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court,' it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure. * * *."

In *Patterson* v. *Winn, et al.*, 5 Pet. 233, 8 L. ed. 108, the court was considering a rule which prescribed the method of proving lost instruments and providing that secondary proof of their contents could only be received in accordance with the rule. Proof of the instrument did not accord with the rule but did fulfill the requirements of the common law. In passing on the question, the court said:

> "We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; *and that it was not competent for the court to exclude it by its own rule.* However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general principles of law. The judgment must therefore be reversed and the

cause remanded to the Circuit Court with directions to award a *venire facias de novo.*" (Italics ours.)

In *St. Louis & San Francisco Railway Company* v. *McAllister*, 165 Pac. 1123, this court says:

> "Of course, courts have the inherent power, independent of any statutory provisions, to promulgate rules for the regulation of their practice and business; but they can make *no enforceable rule that contravenes a statute or the law of the land.*" (Italics ours.)

Goodwin v. *Bickford*, 93 Pac. 548, involved the validity of a rule of Oklahoma Territorial Court requiring that the plaintiff in error in an appeal from the probate court make a deposit of $5.00 to apply on the costs of the clerk of the District Court. In holding the rule repugnant to the statutes then in force, the court says:

> "We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and business, but they can make no rule that contravenes a statute or the law of the land. *Prindeville* v. *People of the State of Illinois*, 42 Ill. 217; *August Fisher* v. *National Bank of Commerce*, 73 Ill. 34; *Thomas Purcell* v. *Hannibal & St. Joseph Railroad Company*, 50 Mo. 504; *United States* v. *James G. Swan, et al.*, (D. C.) 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court, that a different rule from the one announced above applies, or that a court has control over the same superior to the legislative department of the government, and that a court may make a rule governing the

same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute. *Maggie E. Bradford* v. *Southern Railway Company*, 195 U. S. 243, 25 Sup. Ct. 56, 49 L. ed. 178.

* * * * * * *

"* * * We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for costs shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called appellant does not appear, the same may be dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute, and would be invalid."

The statute governing defaults in Ohio provided that "in an action upon an account or written instrument for the payment of money only or in foreclosure, judgment may

be entered at any time during the term after the defendant is in default for an answer; but the court may for good cause shown give further time for answer."

Rule 16 of the Superior Court (that being the trial court) provided that if a party neglected to file proper pleadings within the time fixed by statute or expiration of leave granted to amend, he should be held to be in default, and that the clerk should note the fact of default and notice thereof should be given in the Index for three successive days after which the cause might proceed to judgment.

Judgment was rendered on default without compliance with Rule 16 and before the expiration of the three days fixed by that rule. After the term the court vacated the judgment and this was held to be error. We quote the following from the opinion in *Van Ingen* v. *Berger*, 82 Ohio St. 255:

> "It would seem not to require argument to show that the statute and the rights of parties under it cannot be abridged by a rule of court, and if a rule is framed so as to defeat or materially restrict the clear purpose of the statute, such rule cannot be held valid. It is insisted by counsel for defendant in error that the word 'may' in the above section, and the last clause respecting the giving of time to answer, indicate that the rendition of judgment or its refusal is discretionary, and that the rule requiring three days' notice of default in the Court Index is not an abuse of discretion. This proposition, so far as it relates to discretionary power, or at least to the extent that the action of the court involves the exercise of some discretion, may be conceded, for it is held in *Dallas* v. *Fernean*, 25 Ohio St. 635, that where judgment is rendered on default, in an ac-

tion on an account, without proof of the plaintiff's claim, there is no error for which the judgment will be reversed, the requiring such proof, on failure to answer, being a matter within the discretion of the court. But this does not seem to advance the argument of counsel in this case. If the court possessed discretion to allow or refuse judgment on default, and might have required proof of notice in the Court Index before allowing it, it then exercised its discretion in favor of the plaintiff; it rendered the judgment. If the court had required compliance with Rule 16 before rendering the judgment, and the plaintiffs were complaining of that, we would then have the question which counsel argue. The findings of the trial court and entry of judgment are explicit. They apparently show the right of the plaintiff to a judgment by default precisely as it was rendered. If it was the absolute duty of the court, irrespective of any rule of court, upon plaintiff's demand for a judgment to render such judgment, then of course the rule could have no effect upon the situation, while if the court had discretion to refuse plaintiff's demand, or comply with it, it could not be deprived of that discretion by a rule of court unless the rule is in law superior to the statute. We think it is not. To hold that it is superior would be to hold that a court is superior to the law, and by a rule can make a special rule of law for the City of Cincinnati, upon a subject of a general nature, different from the law prevailing in other sections of the state, a power which has been denied to the general assembly itself.

"The rule is attacked as being invalid. We are not called upon to discuss this question, as it is not presented by the record. Whether or not, as a guide to the exercise of proper discretion in entering judgments by default, the rule is or not a reasonable one, may be properly left for decision until a case arises presenting the question."

The Circuit Court of the United States, in Alabama, by a general rule adopted the practice of the state courts which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court unless with the consent of counsel. In this case bill of exceptions was signed by the judge of the Federal Court after the adjournment of court and without consent. In holding that this was sufficient although not complying with the rule, the court in *United States* v. *Breitling*, 20 How. 252, said:

> "But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the state, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules or to except a particular case from its operation, whenever the purposes of justice require it."

The Circuit Court of Christian County, Missouri, had a rule which required the defendant in a criminal case who desired witnesses in excess of a certain number to make application supported by affidavit setting forth the names of the witnesses and the facts which witnesses were expected to testify to. After quoting the bill of rights of the Constitution of Missouri and the statutes relating to process for witnesses in original cases, the court, in *State* v. *Gideon*, 119 Mo. 94, says:

> "The statutes are sufficient, if carefully and faithfully executed, to exclude the fees of all unnecessary witnesses; more severe than this, they ought not to be.
>
> "It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those

of other courts of last resort in the several states: *Hickernel* v. *First National Bank*, 62 Pa. St. 146; *Oates* v. *Mack*, 6 Cal. 401; *State* v. *Posey*, 17 La. Ann. 252, 87 Am. Dec. 525; *Patterson* v. *Winn*, 5 Pet. 242."

There is an extended note to this case in 41 Am. St. Reports and the limitation upon the power to prescribe rules is discussed fully, beginning at page 641.

State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525, was a proceedings for mandamus and the plaintiff alleged that she had instituted suit for a money judgment and that the case, being ripe for default, she asked for a judgment and that judgment was refused. The judge responded that he had adopted a rule for the term and under similar circumstances would renew it at another term "that no cases should be tried except the criminal cases and matters of succession" and that he was induced to make this rule by reason of the distress of the people immediately following the civil war. The court, in granting mandamus, announced the rule as follows:

> "In this case the judge has, without even a request from either party, arbitrarily forced a continuance. He has yielded to solicitations of persons, not parties, and deprived relatrix of the legal right of trial of her cause.
>
> "The judiciary is not by the constitution invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.
>
> "The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law making power and not to the judiciary."

In *Suckley's Administrator* v. *Rotchford*, 13 Grattan 60, 65 Am. Dec. 240, it was said:

> "In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpoena issued, still, as the law directed otherwise, the law must prevail. Although the Supreme Court had authority to prescribe rules of practice in the Circuit Court, those rules must be subordinate to the law. Although Congress might have repealed or altered the law, yet it could not delegate that authority to another body."

The Superior Court of Cook County, Illinois, adopted a rule whereby an action *ex contractu* may be brought to trial out of its order upon the docket, upon the affidavit of the plaintiff of a belief that the defense is made for delay, unless it is made to appear by affidavit of facts in detail that the defense is made in good faith. The Supreme Court of the state, in *Fisher* v. *National Bank of Commerce*, 73 Ill. 34, held such a rule to be void and said:

> "And the defendant, in such case, to entitle himself to a trial *under the statute*, is only required to file an affidavit with his pleas, stating that he verily believes he has a good defense upon the merits, while *under the rule of the Supreme Court* he is compelled to make it appear to the court by affidavit of facts in detail, that the defense is in good faith. The practice, being regulated by law, must, under the Constitution, be uniform; and from whatever source the Superior Court

may have assumed to derive its authority to adopt the rule, inasmuch as it is *inconsistent with the general law*, it is void and of no effect." (Italics ours.)

If we are correct in our conclusion that Rule 9 is a rule of procedure only, and admitting that it is binding upon the County Courts and litigants in the sense that the latter have a right to invoke it, yet, if the rule is not invoked at the time, and during the course, of a proceeding which results in judgment, can such judgment be afterwards collaterally assailed in an independent proceeding because the court and the parties to the transaction failed to observe the rule? The question, we think, should answer itself.

In a long line of decisions the Supreme Court of Oklahoma has construed certain statutes relative to the proceedings of probate courts in respect to infants and their property as directory only, a failure to observe which, while irregular and erroneous, is not fatal to the jurisdiction. Some of these cases decided prior to the time the rights in question here arose, are:

Spade v. *Morton*, 38 Okl. 384;
Eaves v. *Mullen*, 107 Pac. 433;
Hathaway v. *Hoffman*, 153 Pac. 184;
Baker v. *Cureton*, 150 Pac. 1090;
Socken v. *Winstock*, 144 Pac. 372;
Parmenter v. *Ray*, 158 Pac. 1183;
Cowen v. *Hubbard*, 151 Pac. 678;
Coules v. *Lee*, 128 Pac. 688;
Cabin Valley Mining Co. v. *Hall*, 155 Pac. 570.

These cases held that various statutory provisions, although just as mandatory in form and language as Rule 9,

are directory merely and did not affect the jurisdiction of the court.

In *Spade* v. *Morton* and *Eaves* v. *Mullen*, it was held that the faliure to conform to the statute requiring notice by advertising of all sales of an infant's real estate was not a jurisdictional defect. *Baker* v. *Cureton* and *Hathaway* v. *Hoffman* held that the failure to give notice of the appointment of a guardian, although the language of the statute in that respect is mandatory in its form at least, was jurisdictional.

In *Parmenter* v. *Ray* the provision of section 5285 of the Revised Laws of 1910 requiring that the probate court in the appointment of a special administrator *must* give preference to the person entitled to letters testamentary or of administration was held not to be mandatory but that in making such appointment the court may exercise jurisdiction, and the court refused to follow the case of *In re Misc*, (Montana) 38 Pac. 228, holding the contrary.

Cowen v. *Hubbard* held that a defective petition for the sale of lands gave the court jurisdiction and that a sale thereunder was not subject to collateral attack.

In *Welch* v. *Fackt*, 171 Pac. 130, the Supreme Court, speaking through Justice RAINEY, summing up the doctrine announced in these cases, says:

> "Before we proceed further it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of the ward's real estate. As was observed in *Eaves* v. *Mullen*, *supra*, practically all the courts agree that there are many defects in the sale proceedings of a

ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional but we have adopted the other rule, and there are many compelling reasons unnecessary to be stated at this time, why we should not at this late day depart therefrom."

Probate courts for many years have acted in accordance with the doctrine established in this jurisdiction by the foregoing decisions. They have announced a principle that irregularities, errors, failure to observe some statutory provision, although mandatory in its language and form, do not affect the jurisdiction of the County Court so as to make its judgments and orders subject to collateral attack. In this state of the decisions it could hardly be anticipated by the parties to the transaction in question that the court would completely reverse itself and adopt that strict construction of the controlling statutes which by a course of decisions extending over many years they had refused to do. The Prairie Oil & Gas Company was justified in assuming that Rule 9, although having the force and effect of a state statute, would be deemed directory only and as a mere rule of procedure not affecting the jurisdiction of the County Court. Certainly it could never have anticipated that the Supreme Court would do what no other court has ever done, that is to say, promulgate a rule in pursuance of a statute giving it authority to make rules to carry into effect the statutes of the state, and then construe the rule as superior to such statute.

The statement in the *Winona* case that the probate rules grew out of, and were made necessary by the opinion in *Huff v. Keaton, supra*, is incorrect. These same rules were in force in most of the probate courts on the east side of

the state prior to their promulgation by the justices of the Supreme Court of Oklahoma. Their main purpose was to secure uniformity in the rules governing transactions relative to Indian lands and to fix certain specified dates upon which such matters would be heard so that the United States probate attorneys, who in many cases had to attend more than one court, might have an opportunity to be present and in order that the dates of hearing in the various counties over which he had jurisdiction might not conflict. One or two of the county judges would not agree to this plan, and it was for that reason the justices of the Supreme Court were appealed to for the purpose of making it obligatory on all the probate courts to adopt the same rules. It may be true that a public sale of leases, after notice, was the policy, both of the state courts and of the originators of the rules but in *distinct recognition of the power of the court to order a private sale under the statute* it was expressly provided in Rule 18 that *notice might be waived* unless it was a notice required by law, that is, by a statute of the state.

The case of *Winters v. Oklahoma Portland Cement Company*, 164 Pac. 985, cited in the *Winona* case in support of the court's conclusion has no application to the question. That case involved a substantive law—an act of the legislature taking away from the County Court its necessarily admitted *former discretion and power* to confirm a sale of a minor's land at private sale for less than ninety per cent of its appraised value. The act of the legislature was not for the purpose of regulating the procedure of such a sale, for in express and mandatory terms it prohibited it. Suppose such act had not been in existence; would the court then have had power by a *mere rule* to prohibit such a sale? And could the Supreme Court now by *rule* provide that a sale

for less than *ninety-five* per cent of the appraised value should be valid notwithstanding the statute permitting its confirmation for *ninety* per cent? If the answer is that it could not do so because such a rule would be inconsistent with the statute, then of course the whole argument falls to the ground for Rule 9, if construed to *prohibit* a private sale, is inconsistent with the conceded, acknowledged and decided power of the court, prior to Rule 9, to direct a private sale.

Cabin Valley Mining Company v. *Hall*, *supra*, decided February 16, 1916, involved the making of a private contract between the only persons interested, the lessor and lessee, extending the term of an existing lease. The question in the case was as to whether a County Court had jurisdiction to authorize the extension of a lease theretofore made by a guardian to the lessee in that lease. The County Court in that case had authorized the guardian to make and execute a contract with the lessee of an existing lease, extending the term. It was held that the power and jurisdiction of the County Court, not being inherent, were to be determined by the constitution and laws of the state, and the conclusion was reached that, under the Constitution and Statutes of Oklahoma, the court had such power and that the grant of power embraced authority in these courts to afford such relief as was formerly administered by courts of equity in like matters. This court in *Tibbets* v. *Clayton*, 288 Fed. 393, called attention to the *Cabin Valley Mining Company* case, and other decisions of the State Supreme Court, establishing and recognizing the practice in County Courts in respect to extending the terms of existing leases without a public sale, and recognizing the jurisdiction of such courts in the premises.

The decision in the *Cabin Valley Mining Company* v. *Hall* case, which cited other decisions of the same court in support of its conclusions, was only four months old when the County Court directed the extension of the leases in question, and approved the terms of the agreement which had been reached between the guardian and the lessee, Los Angles Cherokee Oil Company. That decision had not been reversed or modified when The Prairie Oil & Gas Company purchased the leases so extended in April, 1917. True, Rule 9 was then in force, but could it be contemplated that the Supreme Court of the state would apply, or that it would have the power to apply, that rule so as to give it the effect of a mandatory statute of the state depriving the County Courts of their jurisdiction to do every thing which it was held in the *Cabin Valley Mining Company* case and other cases they had the power to do under the constitution and laws of the State? Could it be then supposed that the justices of the Supreme Court could, under their right to make rules of procedure, usurp the functions of the legislature, for that is really what *Winona* v. *Barnes* decided. We agree that the Supreme Court may prescribe rules of procedure for inferior courts and that it may enforce obedience to the rules, not only by parties to legal proceedings in these courts but by the courts themselves. But we cannot concede without doing violence to the principles upon which our form of government rests, the power of the Supreme Court, or its members, to declare that such rules cannot be waived by the parties interested, and that their strict observance is essential to the jurisdiction of the County Courts, a jurisdiction which they exercised, with the full approval of the Supreme Court, and by virtue of the constitution and statutes of the state, long before the rule was enacted, and which jurisdiction indeed the rule itself impliedly recognizes.

If then The Prairie Oil & Gas Company purchased these extended leases at a time when the state Supreme Court by its decisions, had recognized the authority of the County Court to grant the extension by its approval of a contract between the parties interested to that effect, and could not have anticipated that the existing rules were anything more than regulatory of the procedure, which might be waived, and could not affect a completed transaction in which all parties interested had acquiesced, and to which they had given their free consent, so far as the record discloses, then it acquired a vested property right of which it cannot be divested merely because the Supreme Court, subsequent to that time, has given to a rule of procedure the effect of substantive law, and has construed it to be mandatory and its observance a condition to the jurisdiction of the County Court. As said in *Haskett* v. *Maxey, supra:*

> "Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well-understood exception. This exception is that: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment'."

The argument based upon *Ex parte Virginia*, 100 U. S. 313, that because the Supreme Court of Oklahoma decided

in *Freeling* v. *Kight*, 152 Pac. 362, that it had power to mandamus a probate court to recognize these rules, the decision necessarily amounted to a holding that the rules go to the jurisdiction of the probate court, is a *non sequitur*. The right to a superintending control of inferior courts is older than American civilization. It is that exercised for many centuries by the Court of King's Bench over the inferior tribunals of England. (2 Blanckstone, p. 111.) Such superintending control was for the purpose of keeping inferior courts within the bounds of their jurisdiction; certainly not to impair that jurisdiction. The provision of the Oklahoma Constitution quoted by petitioners that "the original jurisdiction of the Supreme Court shall extend to a general superintending control of all inferior courts and all commissions and boards created by law," was not the source of the power of the justices of the Supreme Court of Oklahoma to make rules for inferior courts. That power is granted to them by section 5347, Revised Laws of 1910, and in the preamble to the adoption of the rules they expressly state that the rules were made pursuant to that section. If it were true that the constitutional provision referred to was the source of power to make the rules in question, as intimated in the *Wisosa* case, then the legislature could not take away such constitutional power from them and could not legislate on that subject, as it attempted to do by the Act of April 4, 1919, Session Laws of Oklahoma, 1919, page 288. That position is contradicted by the action of the justices of the Supreme Court when, on June 11, 1917, they recognized the right of the legislature to legislate on the subject, by revising the rules so as to omit Rule 10, because "the matters regulated therein have been provided for by statute." (171 Pac. IX.)

The case of *Freeling* v. *Kight*, *supra*, is cited by petitioners as holding that a County Court is without authority to dispense with the probate rules. Of course the power of the Supreme Court to make a rule of procedure a matter of jurisdiction so as to take away the constitutional or statutory authority of inferior courts, is not determined merely by the claim that it has that power, so far as this court is concerned. But let us see what was involved in *Freeling* v. *Kight*. The County Court of Rogers County had, on June 5, 1914, adopted these same probate rules, which had in fact been suggested to all the probate courts by the Department of the Interior. After the promulgation of the rules by the justices of the Oklahoma Supreme Court, they were re-adopted by the Rogers County Court on July 15, 1914, and continued in force until July 4, 1915, when the county judge made an order vacating and setting them aside, and adopted other rules in conflict therewith. The state, on relation of Freeling, its Attorney General, applied for a writ of mandamus to compel the county judge to observe the rules. But there was not involved in that case the validity of any judgment or order of the court with respect to any matter pending before it, or any transaction completed with the consent or acquiescence of all parties in interest without a compliance with the rules. No construction or interpretation of the rules, or their effect, upon acts done by the court under them, was involved. The sole question presented was the right of the justices of the Supreme Court, under the statute referred to, to make and enforce obedience to its rules, prescribed "for the proper and expeditious conduct of the business of said court and other courts of record of said state." That right, even without an authorizing statute, may be conceded. That was the only thing which the

court was called upon to decide in the *Kight* case. It was the only thing which it did or could decide. The question here was in no way involved. The only observation of the court in that case which at all pertains to the question here was that a rule of court has the force and effect of law. We admit that, of course, in the sense that it must be obeyed by the parties interested in the subject-matter to which it applies. Either that court, or counsel here, has confused law in the substantive sense with law in the sense of regulation and procedure. The legislature has the power, for instance, to make a certain act criminal which otherwise would not be so, and to fix the punishment. But could a court, by a rule, make such a "law?" The court may by rule *regulate the manner of conducting a private sale* which is admittedly authorized by the Oklahoma Code—and which the state court has often recognized—and such a rule, of course, has probably the same force and effect as a statute of the legislature enacted *for the same purpose*. But the court could not by rule *prohibit* a private sale. Its power is to *regulate* the procedure in the doing of a lawful act, not to *prohibit* the doing of the act itself.

The statute, under which the Supreme Court justices acted in making the rules, makes it their duty to meet every two years during the month of June at the capital of the state "and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code."

—Section 890, Revised Laws, 1921

Now, one of the provisions of the code to which effect must be given is that the probate court has the right to order the private sale of a lease. That is necessarily so, both

under the statute and the prior decisions of the court. Any rule made by the justices must therefore give effect to such provisions; but the decision of the court in the *Winona* case is that the rule takes it away. The section quoted further provides that the justices of the Supreme Court "shall make rules consistent therewith as they may deem proper"; that is, consistent with the code. A rule taking away the very power given by the code, namely, the power to make a private sale, is certainly inconsistent therewith and in violation of the statute.

—*Beers* v. *Haughton*, 9 Pet. 329.

IV.

The second proposition urged by petitioners is that the extensions should have been set aside because of fraud in obtaining them.

The fraud charged in these cases was that the extensions of the leases were void for the reason that they were

> "procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly inadequate consideration, the actual value of the said agreement at the date thereof being not less than $175,000.00, while the consideration actually paid was only $18,000.00, the lands herein described as the allotment of the said William G. Twist, deceased, and covered by this action, being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to-wit: That the officer of the said Los Angeles Cherokee Oil Company having full and complete control of the operations of the company, and all its business was one

J. F. Pitt, and another of the said officers was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execuite her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment of the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement, the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his co-operation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and suggested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers, consented to the proposed agreement, and signed the papers prepared for her by the said officer of the said company. That to further lull the suspicions of the

guardian, and to present the appearance of fair dealing, the said Los Angeles-Cherokee Oil Company, through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of public sale was given, but plaintiffs aver that said notice is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and entered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles-Cherokee Oil Company to bid thereon." (R. 5, 6 and 7.)

The testimony of Leoria L. Twist Weldy, so far as it relates to the charge of fraud, is as follows:

Q. The Los Angeles-Cherokee Oil Company operated this property and produced oil from it?

A. Yes, sir.

Q. And each of the tracts, did they?

A. Yes, sir.

Q. After the period of operation was any inquiry made of you with regard to changing the form of the leases?

A. There was.

Q. When and by whom?

A. Well, at different times, by Mr. Pitt, also Mr. Anderson at one time.

Q. Mr. Pitt and Mr. Anderson to whom you refer were gentlemen associated with the Los Angeles-Cherokee Oil Company?

A. They were; they belonged to the company, stockholders.

Q. Do you remember how long before certain court proceedings were instituted they first begun to talk with you about the extension of these leases or the changed form of the leases?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial to any issue.

The Court: I will let it go in the record.

Mr. Davidson: Exception.

A. Well, it was in 1909, the first time they ever named it to me.

The Court: Who named it to you?

A. Mr. Pitt and Mr. Anderson were both together.

The Court: Who is Mr. Pitt?

A. He was a stockholder and foreman or something for the Prairie people.

Q. He had charge?

A. Yes, sir.

Mr. Davidson: It surely couldn't be material back as far as 1909.

The Court: No.

Q. Just prior to the institution of the court proceedings did Mr. Pitt or Mr. Anderson on behalf of the Los Angeles-Cherokee Oil Company talk to you in regard to the changing of the form of the leases?

A. Yes, sir, Mr. Pitt did several different times for the last year or two before we did change.

The Court: Mr. Linebaugh, she signed a petition here which sets out these facts. I don't see the relevancy of any conversation she had with them.

Mr. Linebaugh: Well, to show why she filed the petition.

Q. You filed a petition with the County Court of Tulsa County asking that the form of these leases be changed or the terms be changed?

A. Yes, sir.

Q. Who prepared that petition?

A. Well, I think that Mr. Rice & Lyons. I am not sure.

The Los Angeles-Cherokee had them prepared themselves.

Q. Where were you when you signed the petition, if you remember?

A. I think I was at home.

Q. Who brought the petition to your home?

A. Mr. Pitt.

Q. Why did you sign the petition?

Mr. Davidson: We object to that.

The Court: I will see what her answer is.

A. Well, there was various reasons.

Q. Tell the court what those were.

A. Well, kind of fear, to be positive.

The Court: Fear?

Q. Fear of what?

A. Well, I had been getting letters from different oil companies around me——

The Court: Oh, well; I will exclude that.

Mr. Linebaugh: I think probably this will be of some importance, your honor.

The Court: Why?

Mr. Linebaugh: The fact that she had received letters saying that they were going to put vacuums on wells adjacent to her property. Mr. Pitt says if vacuums are put on we will have to put vacuums on and that will draw all the oil out very quickly and you had better take this $18,000.00. But we will show immediately after she filed this petition those letters stopped coming and no vacuum was put on.

The Court: I will let it go in and hold against you on it.

Mr. Linebaugh: That is merely one of the circumstances.

The Court: If that is all you have got.

Mr. Linebaugh: No, that isn't all, your honor.

The Court: That is a reflection on her as guardian. Who was your attorney, madam?

A. I didn't have any to represent me at that time, they done all the work themselves. I was in very poor health. I had had one but I didn't have any right at that time because they said it wasn't necessary, they would fix the papers all themselves.

Mr. Davidson: Did Mr. L. J. Martin represent you?

A. No, not at that time.

Mr. Linebaugh: We offer to prove——

The Court: Don't offer to prove, but put it in there.

Q. You may go ahead with the statements, if any, that were made——

The Court: Statements made by Mr. Pitt. The letters are the best evidence of what they contained.

Q. What statements, Mrs. Weldy, if any, did Mr. Pitt or Mr. Anderson make to you at the time they were discussing with you the question of changing the form of the leases with regard to the installation of vacuums on the wells?

Mr. Davidson: We object to what Mr. Pitt says. Her evidence is, Mr. Pitt was foreman.

The Court: She testifies Mr. Pitt came to her to get her to sign the extension. If he made any negotiations that would be evidence that he was acting for his company.

Mr. Linebaugh: You may answer.

A. Well, he said that if the other companies put those vacuums in they would soon kill the life of the wells, and also when he was wanting me——

The Court: Now, let me ask you a question. If you didn't extend the leases you would get the wells back, wouldn't you?

A. Certainly.

The Court: Then you could have had vacuums put on or made arrangements?

A. Yes, but if they had put them on they would have killed those wells before we got them back.

The Court: They would have forfeited the leases if they hadn't.

Mr. Linebaugh: Those are facts, we know, but she didn't.

The Court: Yes, but it was her business to go to her counsel. If you are going to have such clap-trap as that, then no contract is sacred.

Q. What, if anything, did Mr. Pitt tell you would be the effect of placing vacuums upon the wells?

Mr. Davidson: We object to all this.

The Court: I am going to let them put it in and hold against them.

A. They said it would suck all the oil out of the ground. He said if we don't the other companies will get the oil.

The Court: That is no false statement. That is a fact. She had her rights. If they failed to produce the oil she could go and have it cancelled.

Q. Mrs. Weldy, at that time were you having any difficulty with reference to your bond as guardian?

A. Well, I was under surety bond which was costing me quite a bit.

Q. What statements, if any, with regard to your bond did Mr. Pitt or Mr. Anderson make to you during the period of these negotiations for the change of the terms?

Mr. Davidson: We object to that.

The Court: I sustain the objection. The Prairie Oil & Gas Company couldn't have had notice of such as that.

Mr. Pinson: The burden would be on the defendant to prove good faith.

The Court: No, not in that.

Mr. Linebaugh: We will offer to prove by this witness that during this negotiation Mr. Pitt and Mr. Anderson discussed with her the question of her bond and inability to continue it and avowed their willingness to make her bond so that she could retain the guardianship for such amounts as would be necessary, providing she would consent to, accede to their request to sign the petition for the extension of the leases, and subsequently they did in fact make her bond——

The Court: Suppose they did?

Mr. Linebaugh: Becoming surety and that—that was—well, I am making an offer—and such bond with Anderson and Pitt as sureties was filed in the County Court of Tulsa County and was of record at the time of the purchase by The Prairie Oil & Gas Company.

The Court: Suppose they did go on her bond, what effect would that have? How could that constitute fraud?

Mr. Linebaugh: It would constitute fraud when taken with the other circumstances, it seems to us.

The Court: I exclude that evidence. She says she had difficulty with her bond and they said they would help her make it. What is wrong about that?

Mr. Linebaugh: They are using that as an inducement, saying we will agree to make your bond, providing you will do this for us.

The Court: No, I don't think that is competent.

Mr. Linebaugh: We except.

Q Mrs. Weldy——

The Court: I will see what she has to say. You say Mr. Pitt come to you about signing the petition?

A. Yes, sir.

The Court: What did he say to you?

A. Well, of course, he asked me if I wouldn't make a commercial lease, is what he called it; he didn't say anything about a transfer. I told him "Mr. Pitt, I don't care to, because while I am under the Departmental lease we have the protection of the Departme::t." He says, "You have the protection of the whole state under a commercial." I says that wouldn't be much when I had it; no, I don't feel like making that. He made the remark: "You have always done the best for your children in every way." He says, "Do you think by refusing this offer that you are still doing right by your children?" And he says, "Do you think that the court will think that you are doing right?" Of course, I studied about it, and I told him I didn't know what the court would think. He says: "You know there have been a good many guardian seekers' eyes on your minors all the time." And of course when he made that remark it throwed a kind of fear over me that they might try to take the guardianship away from me. That is one of the things that caused me——

The Court: Never mind. What else was said?

A. I don't remember every detail. I told him I didn't like to accept it, but of course I did. He went up and got the papers.

The Court: He told you he would give $18,000.00 for a new lease; is that what he said?

A. For a commercial lease.

The Court: Well, that would be a new lease. Then you signed this application, a copy of which has been offered here?

A. Yes, sir.

The Court: Go ahead.

Q. What statements, if any, did he make to you with reference to the value of the property?

The Court: Don't make suggestions.

A. Well, I told him I didn't think it was enough. He says, "Sure it is enough; it is really more than the leases are worth." And that is when he come over it again. He says, "Do you suppose that the court will think that you are still doing the best for your children if you refuse that?" And that is about all of it that I can remember.

Q. Did you subsequently, after filing the petition, go to the County Court room in Tulsa?

A. Yes, sir.

Q. Who, if any person, accompanied you?

A. Mr. Pitt come and taken me in his car.

Q. Was anyone with Mr. Pitt, or did just the two of you go?

A. I won't be positive, but there was no one went up to the court house with us; I think the other parties were already there.

Q. What other parties?

A. There was one attorney there and I don't know whether it was Rice or Lyons because I was not acquainted with them at the time.

Q. When you got to the court room what happened?

A. Well, Mr. Pitt taken the papers up to the judge.

The Court: You mean he had the papers with him?

A. He had papers with him.

The Court: Why, the petition you filed was in court, wasn't it?

A. He went up and talked to the judge a few minutes.

Mr. Linebaugh: This was on the day of the confirmation, your honor.

The Court: Yes, but the petition she signed would be a part of the court files.

Q. Were you ever in the County Court room concerning this matter except this one time?

A. No, sir.

The Court: You were there when they had the hearing and the judge determined to permit you to make a commercial lease; were you present then?

A. I think the papers were signed at my own house and taken up by them.

The Court: They had been signed but on the day of the hearing you appeared in court and the court granted you authority to make a new lease?

A. It was all done at the same time.

The Court: That was the time you appeared before the court, wasn't it?

A. Yes, sir.

The Court: Judge Ramsey?

A. Yes, sir; Judge Ramsey.

The Court: And Judge Ramsey talked to you about that?

A. Very little. He asked me if I thought I was doing for the best interest of my wards. I told him I did, owing to the conditions surrounding. He said, "I am satisfied that you are; you always have done such." And he says, "I, in my own mind, think it is best." And that is about all that occurred in the court room that day.

Q. Had you signed the papers at that time?

The Court: When did you sign the new lease, there in the court that day?

A. I won't be positive whether I signed it there. I know we went on up to their attorney's office and there was some papers signed there.

Q. Was there any evidence taken in the court room, that

is, were any witnesses sworn and their testimony taken?

A. No, sir.

Q. Were you sworn and your testimony taken or just these questions asked you at the judge's bench; was there any auction sale conducted in the court room?

A. No, sir, not while I was there.

The Court: Well, do you know whether there was any other evidence taken before the judge?

A. There were none taken while I was there. There were no questions asked anyone else while I was there.

Q. Did the judge sign the order while you were standing at his bench there?

A. Well, the judge signed the papers right there.

Q. While you were standing at the desk?

A. Yes, sir.

Q. And then you think you went up to Rice & Lyon's office?

A. Yes, sir.

Q. And possibly signed some papers up there?

A. I know I signed something, some papers.

Q. Now, was there any auction sale while you were standing there at the judge's desk?

A. No, sir.

Q. Or any bidding while you were in the court room?

A. No, sir; there was nothing said to that effect.

Q. Nobody asked if anybody wanted to bid?

A. No, sir.

Q. How long were you in the court room altogether?

A. Well, we wasn't there very long. Of course, there were one or two parties ahead of us to see the judge and we had to wait until they were through. I don't think we were in there over thirty minutes at the outside.

Q. After the judge signed the paper at his desk how long did you remain in the court room?

A. Just a few minutes.

Q. Who went out with you?

A. Mr. Pitt and the two attorneys.

Q. Was that the only time you were up in the County Court room concerning the sale of this commercial lease, as you term it, or extension lease?

A. It was.

Q. Now, had you any conversation with your son, Albert T., with regard to the guardianship?

A. Yes, sir; we talked it over several times.

Q. Before you signed the petition?

A. Yes, sir.

Q. What statements, if any, did he make to you——

The Court: Never mind about that. Do you object to that?

Mr. Davidson: Yes, sir, we object to all this.

The Court: I sustain the objection to that.

Mr. Linebaugh: Will the court permit me to finish my question so as to make my offer?

The Court: No, that is not the rule in the Federal Court.

Mr. Linebaugh: I will ask it this way, if I may, your honor:

Q. Did your son, Albert T., tell you of certain statements which Mr. Pitt had made to him concerning your guardianship?

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: We except.

Q. Mrs. Weldy, the $18,000.00 offer which Mr. Pitt made, what was that for?

A. Well, it was for the making of a commercial lease, he said.

Q. On what properties?

A. On the W. G., Albert T., Jesse L. and Edward C.

Q. That was four separate allotments, were they?

A. Yes, sir.

The Court: He said he would pay as much as $18,000.00 for a commercial lease on these allotments; that is what he meant by an offer, isn't it?

A. Yes, sir.

Q. Now, who, if you know, made—if there was any division of that $18,000.00 made as applying to each of the separate allotments, who made it?

Mr. Davidson: If the court please, we object to that.

The Court: Yes, I sustain the objection. The record shows what was done.

Q. Who, if any person—well, I will ask you this: Prior to the petition being brought to you for your signature by Mr. Pitt, was the method of division and amount of the division of the $18,000.00 discussed and agreed upon between you and Mr. Pitt?

Mr. Davidson: We object to that; wholly incompetent.

The Court: I sustain the objection.

Q. Was any separate price ever suggested by Mr. Pitt or agreed upon between the two of you as to the separate allotments?

A. No, sir.

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: Exception. That is all.

Cross Examination by Mr. Davidson.

Q. You say you had no lawyer?

A. I didn't have anyone representing me at that time.

Q. Did you have a man named Robertie?

A. I didn't at that time.

Q. You didn't go to see him?

A. No, sir.

Q. You didn't go to see him?

A. No, sir.

Q. He was your attorney?

A. Yes, sir.

Q. Didn't you employ L. J. Martin?

A. Not in this.

Q. Didn't L. J. Martin go up to the court with you the time Judge Ramsey had this hearing?

A. If he did, I do not remember it.

Q. You never employed Mr. Martin?

A. Mr. Martin did do work for me.

Q. When, after that or before that?

A. Well, before and some a er that. He made the final reports for the two children when they became of age.

Q. Do you say now you didn't go with Robertie or Martin?

A. No, sir.

Q. You didn't go to any attorney at all?

A. Mr. Pitt came down and we had the talk and he said it won't be necessary for you to pay any attorney fee.

Mr. Linebaugh: Won't you let her complete her answer?

The Court: I excluded that because it is not responsive to the question.

Q. You signed this petition and swore to it, didn't you?

A. Yes, sir.

Q. Over six years ago?

A. Well, it was when the lease was being made.

Q. And there has been nothing to prevent your coming to court with this matter within the last six years?

A. The children, when they became of age, took it up.

Q. But you still represent three minor children?

A. I do.

Q. You have an interest in William G. Twist's land as his widow?

A. I have a third interest.

Q. And you are getting your share of the one-eighth royalty from that lease?

A. Yes, sir.

Q. And have been all the time?

A. Yes, sir.

Q. And you have filed no suit for yourself?

A. I have filed no suit.

Mr. Davidson: I believe that is all.

Redirect Examination by Mr. Linebaugh.

Q. Mrs. Weldy, why didn't you get an attorney in these proceedings?

A. Well, I don't know, only just I didn't, and Mr. Pitt said he didn't think it would be necessary, they would take care of that.

The Court: He told you that he had an attorney?

A. He didn't come right out and say that; he just said they would take care of that.

The Court: Said they would have the papers fixed up?

A. Yes, sir.

Recross Examination by Mr. Davidson.

Q. There was an agreement there wasn't there that this royalty was to be increased from 10% to 12½%?

A. There was.

Q. And that was part of the consideration?

A. Yes, sir.

Q. And ever since that time an eighth royalty has been paid?

A. Yes, sir.

The Court: How long before the fifteen-year lease had expired when this agreement was made?

Mr. Linebaugh: About two years, your honor. (R. 44-53.)

The court did not by its decree affirmatively find that there was no fraud but it did unequivocally state its conclusions upon the subject in ruling upon the evidence introduced, or offered to be introduced by the plaintiffs.

The assignments of error, as the Circuit Court of Appeals said, disclose that the claim is made by petitioners that the court erred *(1)* in admitting evidence, *(2)* in excluding evidence, *(3)* in refusing to enter judgments for plaintiffs, *(4)* in making findings not supported by the evidence, *(5)* in refusing to make other findings.

The only exceptions to the rulings of the court on the admissibility of evidence was in two instances, namely: they offered to prove by Mrs. Weldy that during the negotiations between her and Los Angeles Cherokee Oil Company for the extension of the lease, Mr. Pitt and Mr. Anderson, its representatives, avowed their willingness to become sureties on her bond as guardian if she would sign a petition to the court for an extension of the lease (R. 47), and

the refusal of the court to permit Mrs. Weldy to testify as to conversations she had with her son, Albert T. Twist, with regard to the guardianship prior to the time she signed the petition for an extension of the leases (R. 50, 51). The assignments of error do not go to these specific rulings.

The argument in support of the claim of fraud is substantially: that Pitt and Anderson, the representatives of Los Angeles-Cherokee Oil Company, became Mrs. Weldy's bondsmen in Mrs. Weldy's guardianship case for the purpose of influencing her decision to petition the County Court to approve the extension of the leases; that they stated to her that the amount proposed to be paid was more than the leases were worth, and that she would not be doing right to reject the offer, and that the County Court would not look favorably upon such refusal on her part, and that she was led to fear that the County Court might remove her and place the affairs of her children in the hands of strangers. All this is urged in support of the allegation that the extension of the leases was procured by the "fraud, duress and false dealing of Los Angeles Cherokee Oil Company."

It is not necessary to argue here that this does not amount to fraud or duress, even if Mrs. Weldy was the sole judge of the expediency of extending the term of these leases. So far as her rights as the widow of William G. Twist are concerned, she is making no complaint, and has instituted no suit in her own behalf. As to the rights of her wards the probate court is the tribunal to determine whether it was for their best interests to have the terms of these leases extended. That court could have made such an order upon the petition of the lessees even if the guardian had refused to file a petition for that purpose, if it was con-

vinced that such extension was for the best interests of the ward. The Oklahoma statute gives the probate court having the appointment of a guardian "exclusive jurisdiction to control him in the management and disposition of the person and property of his ward." (Section 6583, Compiled Laws, 1921.) No fraud is alleged, or attempted to be proven, as having been perpetrated upon the court. As we have seen, the expediency of extending the leases was submitted to the probate court having jurisdiction of the guardianship of the minor lessors, and the court approved such extension. These suits, so far as they are based upon fraud in procuring the extension, are a collateral attack upon the judgment and order of the probate court.

By her petition filed in the probate court Mrs. Weldy, as guardian, represented that the original leases were made for a definite period, without proper regard for the best interests of the lessor and lessee. She set out the condition of the leases, the amount of oil being produced from each lease, the amount of oil accruing to the lessors, to-wit, ten per cent of the oil produced, and that Los Angeles Cherokee Oil Company had offered to increase the royalty from ten per cent to twelve and one-half per cent, and to pay to her for the benefit of herself and her wards, as their interests in the land may appear, an agreed sum of money, and praying that she be permitted to enter into an agreement to extend the term of each of said leases for a period so long as oil or gas shall be found therein (R. 10, 11). There is no intimation that any of the statements in that petition were untrue. The order of the probate court, pursuant to the notice and hearing, recites, as we have already shown, that the court heard evidence and found and approved the consideration for such extensions, and that the proposition was bene-

ficial and for the best interests of the minors. We must assume, in this suit, that the probate court performed its full duty and made such investigation as it deemed proper and necessary in order to determine whether the consideration was adequate and whether the extensions of these leases was for the best interests of the wards. Its orders and judgment in the premises cannot be collaterally impeached. There is no allegation or intimation that the Los Angles Cherokee Oil Company did not perform the conditions of the extensions approved by the court, or that the bonus money was not paid, or that the royalties were not increased, or that the wells were not drilled.

Petitioners indulge in many fine-drawn criticisms of the proceedings, which criticisms appear to be rather an afterthought, and not the basis of attack upon the transaction by the pleadings. They complain that the $18,000 was prorated according to the production of the different tracts, and that this was an arbitrary agreement without regard to the value of the extensions and could not determine their value, and say that such an arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, and the extent of the undeveloped acreage on each tract. But there is no evidence as to the proper method of determining the value of the rights acquired by Los Angeles Cherokee Oil Company. So far as the proof is concerned, the parties, and the probate court, may have taken into consideration the very data suggested by petitioner. The fact that a lump sum of $18,000 was offered as a bonus, instead of so much for each extension, is no evidence of fraud or unfair dealing. In effect the Los Angeles Cherokee Oil Company made a bid of so much for each extension according to the basis of di

vision agreed upon, aggregating $18,000.00, and which was approved by the court.

Petitioners also claim that the bonus of $18,000.00 was the sole consideration. But this is not true, and indeed it may have been the least important. One of the motives inducing the sale may have been the fact that if the leases had not been extended the lessee could remove its equipment, for, of course, it could not have been compelled to sell that equipment to any other lessee. The removal of such equipment, it is obvious, would injure the wells on the land, possibly irreparably. An extension of the lease to the same operator would obviate that danger. The discrepancy between the bonus paid for the extension and the price later paid for an assignment of the extended leases by Los Angeles-Cherokee Oil Company to The Prairie Oil & Gas Company, if material at all, can be explained by the circumstance that The Prairie Oil & Gas Company bought the whole property, including the lessee's equipment, which, of course, could not have been taken into consideration in estimating the value of the extension. The value of a lease with the operating equipment in place and being used, is one thing; the value of the same lease, dismantled of its operating equipment, is quite a different thing. Certainly The Prairie Oil & Gas Company had the right to assume that the probate court, in approving the extensions, had determined the adequacy of the consideration. Surely it was not bound to inquire whether fraud had been practiced on the court in obtaining its judgment. One's estimate of the oil still recoverable from the land is a matter of speculation at best; the probability of new oil sands, which may be indicated by the drilling of new wells, either on the leased tract or upon adjoining land, different or improved methods of extraction;

the skill and experience of the operator; and, it may be, greater economy in management, wider knowledge of markets, and better marketing facilities, are all to be taken into account in arriving at the price which the purchaser is willing to pay for a producing lease. Indeed there are too many elements to be considered in determining the prospective value of an oil and gas mining property at a given time—fluctuating as such values must necessarily be—to make the mere fact of a discrepancy between a price paid to a land owner for an extension of the fixed term of an existing lease, and that paid eight months later for the whole interest and estate of the lessee, any criterion whatever on the question of fraud based on inadequacy of consideration. The argument as to the comparative amount of production, and the current market price of oil, at the two periods, is too narrow in its scope and is wholly insufficient as a predicate for the cancellation of these extended leases on the ground of fraud. As this court has said in *The Atlantic Delaine Company* v. *James*, 94 U. S. 207:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear."

In *Maxwell Land Grant Case*, 121 U. S. 381, this court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct written instrument for fraud or a mistake in the execution of the written instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon

a bare preponderance of the evidence which leaves the issue in doubt."

The court further said:

"If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

And so we say in this case that the doctrine is all the more applicable to an attempt to cancel a completed contract, approved and confirmed by a court which had complete jurisdiction of the subject matter and the parties involved.

Counsel say that the agreement to drill an additional well on each of the leases, within six months, was no consideration because that was an agreement to do that which they were already bound to do. In this they are mistaken. The lessee in an oil and gas lease is bound, within the time prescribed in the lease, to drill at least one well, and that is because of his duty to explore the land by such means. But upon the discovery of oil he is under no obligation to continue the drilling of other wells unless they would be profitable.

—*Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801;
Watchorn v. *Roxana Pet. Co.*, 5 Fed. (2d) 636.

The absolute promise to drill an additional well on each of these leases within six months, whether conditions then indicated a loss to the lease owner and a benefit only to the owner of the land, can hardly be said to be no consideration.

It is also said that the increase in royalty was "but another subterfuge and pretended consideration" because the leases were governed by the regulations of the Department of the Interior, and that such regulations prescribed that after May 1, 1908, the maximum rate of royalty shall be twelve and one-half per cent. But while these leases were under the jurisdiction and supervision of the Department of the Interior at the time they were originally executed, it is obvious that at the time of the proceedings in the probate court the Indian lessors and their allotments had been released from Departmental control, for, otherwise, it would have been necessary to have the Department approve the modification of the leases, and the extension of the terms, and no such claim is made.

Even if the allegations of the complaints and the proof offered in support of them amount to fraud, such fraud was intrinsic. It inhered in the judgment of the court. What the court had to determine was the necessity or expediency of the extensions; whether it would be for the best interests of the wards to have that done; and whether the offer made for the extensions of the leases was an adequate consideration for such privileges. The probate court determined these matters upon the hearing. They were necessarily the subject of its investigation. The judgment must be regarded as the deliberate act of the court. (*Weaver* v. *Van de Venter*, 19 S. W. 889.) That the guardian may have been induced to sign her petition, if that be true, by the promise of the lessee's representatives that they would become sureties on her bond, surely bears no resemblance to fraud. Their statement that the court might remove her if she did not consent to such extension, and that she did not need an attorney, are perfectly consistent with good

faith on their part, and the fraud must be such as to be utterly repugnant to honest intentions. (*Hardeman* v. *Donaghey*, 54 Sou. 172.) In any case these representations were not sufficient to vitiate the judgment, for the probate court determined that the guardian's action in the premises was the right and proper thing to do. A judgment can only be set aside for fraud when the proof of it is clear and convincing, and when the fraud is the basis of it, and but for which fraud it would not have been rendered.

Holton v. *Davis*, 108 Fed. 138;
Doughty v. *Doughty*, 27 N. J. Eq. 315;
Boyden v. *Reed*, 55 Ill. 458;
Ely-Walker Dry Goods Co. v. *Smith*, 160 Pac. 898;
Ray v. *McKnight*, 183 Pac. 489;
Hardeman v. *Donaghey*, *supra*.

In *Scott* v. *Gypsy Oil Co.*, 239 Pac. 887, it was held by the Supreme Court of Oklahoma that the question of the inadequacy of the purchase price of a lease of a minor's lands was an issue involved in the course of the proceedings for the sale, and that the judgment of confirmation precludes inquiry into the subject in a collateral proceeding. The court in its opinion said:

> "This court, in numerous cases, has held that the sale of a minor's interest in real estate, the determination by the County Court of the necessity therefor, and the adequacy of the consideration, are conclusive in a collateral proceeding, in the absence of fraud extrinsic to the record, and are impervious to collateral attack, and the scope of inquiry in a collateral attack is confined to the consideration as to whether the County Court had jurisdiction of such proceedings. *Welch* v. *Focht*, 67 Okl. 275, 171 P. 730, L. R. A. 1918 D, 1163;

Tiger v. *Drumright*, *supra*. To the same effect: *Brown* v. *Trent*, 36 Okl. 239, 128 P. 895; *Bouling* v. *Merry*, 91 Okl. 176, 217 P. 404; *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924."

In *Brooks* v. *Tucker*, 201 Pac. 645, the same court said in respect to the duty and power of a probate court in that state:

> "The law contemplates that the court must be satisfied from credible testimony adduced on the hearing of the return of the sale that the same has been conducted in accordance with the statutes and a fair value paid for the property, and the decree confirming the sale is a solemn judgment of the court vouching for the truthfulness of all of the essential facts necessary to constitute a valid sale. Purchasers in dealing with this class of land have a right to assume that the court has faithfully performed his duty."

In *Harrell* v. *Prairie Oil & Gas Company*, *supra*, the Circuit Court of Appeals said with reference to the sale of an extension of a lease claimed to have been given for a grossly inadequate price:

> "But conceding for the sake of argument that the lease was worth a great deal more than appellee's bid, that fact standing alone did not entitle appellant to a decree. The sale of the lease on June 19, 1916, was a judicial sale by a court having plenary jurisdiction over the parties and the subject-matter. *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924; *Abraham* v. *Homer*, 102 Okl. 12, 226 P. 45; *Tucker* v. *Leonard*, 76 Okl. 16, 183 P. 807; *Thau* v. *Falls*, 136 U. S. 519, 548, 10 S. Ct. 1037, 34 L. ed. 531. That sale was confirmed by the court, and it is the established rule that after confirmation there can be no cancellation of the sale solely on the

ground that the price bid was inadequate. In *Morrison v. Barnette*, 154 F. 617, 624, 83 C. C. A. 391, 398, this court said:

> 'Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids'."

V.

But respondent asserts by its answer that it is a bona fide purchaser. In its answer it alleges that at the time of its purchase of the assignment of these leases from the Los Angeles-Cherokee Oil Company on March 5, 1917, it paid to it more than a thousand dollars; that the consideration was bona fide and actually paid; that at the time of paying the consideration and at the time of the delivery thereof it had no notice or knowledge of the various transactions and representations alleged and set forth in the petition of the plaintiffs between its assignor and their guardian, and had no notice and knowledge of any proceeding and transactions relative to the modification and extension of said leases other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, and avers that its purchase and the payment of the consideration was in reliance upon the apparent legal title of the Los Angeles-Cherokee Oil Company as shown by the public records. (R. 31.)

It was admitted on the trial that Dana H. Kelsey, who was unavoidably absent, would, if present, testify that he acted for the Prairie Oil & Gas Company, in connection with Fred S. Cook, and conducted the negotiations for the purchase from the Los Angeles Cherokee Oil Company of these Twist leases with other leases; that there was paid for them the following sums: For the William G. Twist lease, $112,561.61; for the Edward C. Twist lease, $49,377.38; that at the time of completing such purchase and paying the moneys and taking the assignments "he had no notice or knowledge of the transactions alleged by the petitions to have occurred and alleged to have taken place between the officers or agents of the Los Angeles Cherokee Oil Company and Leoria L. Twist (Mrs. Weldy), guardian, in connection with the agreement to extend the leases, but that he purchased these leases on behalf of the Prairie Oil & Gas Company subject to an examination of the abstracts furnished the Prairie Oil & Gas Company, and that in such transaction H. B. Anderson and a man by the name of Pitt represented the Los Angeles Cherokee Oil Company, and that neither of said persons referred to or informed him concerning any matters, conversations or transactions between the Los Angeles Cherokee Oil Company and its representatives and Leoria L. Twist Weldy." (R. 39-40.) Counsel criticise the stipulation as insufficient to support the plea of bona fide purchaser. They say that there is no evidence in the record that Fred S. Cook was unaware of the nature of the transactions or of the conversations between Pitt and Anderson and the guardian. But the stipulation was that Dana H. Kelsey was the representative of the Prairie Oil & Gas Company. What Fred S. Cook's connection was with that transaction, is not disclosed, and we

therefore cannot assume that even if he knew of these conversations and transactions his knowledge would bind the Prairie Oil & Gas Company. But the real criticism of counsel is that the known facts were sufficient notice that "some improper activities had existed" because the Prairie Oil & Gas Company knew that it was paying very much more than the $18,000.00 which had been paid for the extension of these leases seven or eight months before, and that therefore with this positive knowledge of the discrepancy in the prices paid it could not contend that it was in the exercise of good faith. We have already called attention to the fact that the price paid by the Prairie Oil & Gas Company to the Los Angeles Cherokee Oil Company was for the whole property, including the equipment and that such discrepancy is not a criterion for determining the existence of fraud. Furthermore, the probate court in approving the transaction necessarily determined the adequacy of the consideration. Was it the duty of the Prairie Oil & Gas Company to make inquiry whether fraud had been practiced on the court? As said in *Meehan* v. *Williams*, 48 Pa. St. 238, "what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

In *Wilson* v. *Ware*, 6 Wallace 83, this court said:

> "The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

This court also said in *Townsend* v. *Little*, 109 U. S. 54:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."

Respectfully submitted,

THOMAS J. FLANNELLY,
A. A. DAVIDSON,
Attorneys for Respondent, The Prairie Oil & Gas Company.

WEST, GIBSON, SHERMAN,
DAVIDSON & HULL,
Of Counsel.